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In the

Supreme Court of the United States

PAMELA H. YANCO,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

On May 28, 1992, Police Officer William Yanco was falsely accused of sexually assaulting a ten year old boy he was counseling while on duty as the youth safety and DARE officer. This led to investigation with media coverage by the Police Department and the District Attorney. This directly and exclusively caused Officer Yanco to suffer from a major depressive disorder which, by June 22, 1992, led Officer Yanco to suicide. The U.S. Court of Appeals for the Federal Circuit upheld the denial by the Director of the Bureau of Justice Assistance ("BJA") of the widow's claim for the survivor benefit under 42 USC § 3796 ("PSOBA") because major depression and post traumatic stress disorder even if sustained in the line of duty constituted "stress and strain" under 28 CFR §32.2(g) rather than a "personal injury".

In light of the tragedy of September 11th and the continuing terrorist threat, the ruling by the court of appeals presents a clear and present danger to the nation by establishing a separate category of injuries which are disqualified from the benefits of the PSOBA even when sustained in the line of duty. This case presents a unique vehicle to serve the interests of the entire nation by providing its public safety officers with the certainty that the PSOBA will protect them in all categories of injury at a critical time in the nation's history when this assurance is most needed and can have the most impact.

The question presented is whether the ruling of the court of appeals upholding the BJA Director's denial of the claim of Officer Yanco's widow to benefits under the PSOBA and narrowing of the meaning of the term "injury" to only injuries involving physical assault or trauma to the body is permissible under the relevant statutory language, the applicable BJA regulations and/or this Court's ruling in Consolidated Rail Corp. v. Gottshall v. Carlisle, 512 U.S. 532 (1994).

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Writ 7

Conclusion 20

Appendix

Circuit Court Opinion 1a

Court of Claims Decision 17a

TABLE OF AUTHORITIES

CASES

AUER V. ROBBINS, 519 US 452 AT 461 (1997)..... 13
CHACON V. U.S., 48 F.3D 508 (1995) 10
CHEVRON USA V. NATIONAL RESOURCES DEFENSE COUNCIL, 467 U.S. 837, 81 L.ED2D 694, 104 S.CT 2778, REHEARING DENIED, 468 U.S. 1227, 82 L.ED.2D 921, 105 S.CT. 28, 105 S.CT. 29 (1984) 12
CHRISTENSEN V. HARRIS COUNTY, 529 U.S. 576, 120 S.CT. 1655 (MAY 1, 2000)..... 12
CONSOLIDATED RAIL CORP. V. GOTTSHALL V. CARLISLE, 512 U.S. 532 (1994) 3, 15, 16
DAVIS V. U.S., 50 FED. CL. 192, AT 199 (2001)..... 18, 20
DAVIS V. UNITED STATES, 461 FED.CL. 421 (2000)..... 12, 13
DEMUTIIS V. U.S., 48 FED.CL. 81, 92-93 (2000) 18
GREELEY V. U.S., 50 F.3D 1009 (1995) 10
HAROLD V. US, 634 F2D, 547, AT 552 (1980)..... 20
IN RE FITZGIBBONS' CASE, 373 N.E.2D 1174, 374 MASS 633 (1974)..... 18
ROSE V. U.S., 479 U.S. 1, 107 S.CT. 334..... 10
SMYKOWSKI V. U.S., 647 F. 2D 1003 (1981)..... 9
U.S. V. MEAD, 121 S.CT. 2164, 2167 (2001)..... 14

STATUTES

28 U.S. C. SECTION 1254(1)..... 1
38 USC § 1110 17
42 U.S.C. § 3796(A)..... 18
42 U.S.C. § 3796B(4)..... 14
45 USC § 51 15
5 U.S.C. § 8102 17
PSOBA OF 1976 PUB. L. NO. 94-430, 90 STAT. 1346..... 2
PSOBA OF 1976, 42 USC § 3796..... 1

REGULATIONS

28 C.F.R § 32.4 13
28 C.F.R. §32.8 6
28 CFR § § 32.2(E) 2
28 CFR § § 32.4, § 32.5 3
28 CFR § 32(G) 14
28 CFR § 32.2(G) 3
28 CFR § 32.2(I) 9
28 CFR § 32.5 13
28 CFR § 32.8 13
BJA REGULATIONS, 28 CFR § § 32.2(E), § 32.2(G) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a w[illegible] certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (per Lydon, S.J.) dated January 18, 2000 granting the summary judgment motion of the United States (Appendix ("Pet. App.") 17a.-49a.) is published at 45 Fed. Cl. 782. The opinion of the U.S. Court of Appeals for the Federal Circuit (per Schall, C.J.) dated July 24, 2001 affirming (Pet. App. 1a.) is published at 258 F.3d 1356.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is set forth at 28 U.S. C. Section 1254(1). The United States Court of Appeals for the Federal Circuit issued its Decision in this case on July 24, 2001. This Petition was timely filed.

STATUTORY AND REGULATORY PROVISIONS IN THIS CASE

The provisions of the PSOBA of 1976, 42 USC § 3796, *et seq.*, and the provisions of the BJA Regulations, 28 CFR § § 32.2(e), § 32.2(g) and § 32.2(i), § 32.4, § 32.5, and § 32.8, relevant to this petition are reprinted in Pet. App. 50a.

STATEMENT OF THE CASE

Procedural History

The Petitioner, Pamela H. Yanco, is the widow of William Yanco, who served as a public safety and DARE officer with the Wellesley, Massachusetts police force. Following her husband's death by suicide, Mrs. Yanco submitted a claim to the BJA seeking death benefits under the PSOBA of 1976 Pub. L. No. 94-430, 90 Stat. 1346 (codified as amended at 42 U.S.C. §§ 3796-3796c (1994)). After the BJA denied her claim, Ms. Yanco brought suit in the United States Court of Federal Claims.

In due course, the parties cross-moved for summary judgment based upon the administrative record. After considering the motions, the Court of Federal Claims granted summary judgment in favor of the government and dismissed Mrs. Yanco's complaint. The court ruled that recovery under the Benefits Act was barred because Officer Yanco had not died as the result of a "personal injury" within the meaning of the statute, as interpreted by BJA regulations. Yanco v. United States, 45 Fed. Cl. 782, 792-93 (2000). Mrs. Yanco appealed that ruling to the United States Court of Appeals for the Federal Circuit.

The court of appeals affirmed the lower court ruling on the grounds that 28 CFR § § 32.2(e) and 32.2(g) which together ". . . define the term 'personal injury' so as to exclude stress and strain represent a 'permissible construction of the statute'" because the ". . . legislative history points away from an intent on the part of Congress to have the statutory term 'personal injury' include mental strain." (Pet. App. 13a.) The court of appeals ruled that the term "stress and strain" as used in 28 CFR § 32.2(g) also means "mental strain" (Pet. App. 10a., 15a.) and "mental strain" includes

"post traumatic stress disorder and depression" (Pet. App. 15a.), while conversely ruling that the term "personal injury" as used in the PSOBA was limited solely to a "physical assault or trauma to the body." (Pet. App. 13a.) The ruling by the court of appeals did not address the widow's contention that the BJA failed to consider the requirements of 28 CFR § § 32.4, § 32.5 and § 32.8 (Pet. Br. 25-28, 40) or that the same rules of statutory construction should be applied as precedent to the PSOBA as the rules which were applied by this Court in Consolidated Rail Corp. v. Gottshall v. Carlisle, 512 U.S. 532 (1994) when it held that negligent infliction of emotional distress was included within the meaning of "injury" under a similarly worded remedial statute. (Pet. Reply Br. 5-13)

Statement of the Facts.

The material facts are not in dispute. Mr. William Yanco ("Yanco") worked as a Police Officer for 21 years with the Town of Wellesley (the "Town"). The Police Department selected and assigned him as the D.A.R.E (Drug Abuse Resistance Education) Officer in 1989 and as the Youth Officer in 1992, where his objectives and responsibilities were to earn, through various events and other face-to-face contact, the respect and confidence of the Town youth and parents to facilitate communications and improve relations between the police and its young citizens. Yanco's role was that of ambassador, counselor, and role model. As part of his authorized duties as a Youth Officer, Officer Yanco counseled troubled children and their families, often in their homes. (Pet. App. p.18a.)

On May 28, 1992, while performing his duties as Youth Officer, Officer Yanco was exposed to a false accusation of sexually assaulting a troubled ten year old boy who Officer Yanco had counseled in the course of his duties. Officer Yanco immediately reported the allegation to his

supervisor, and there ensued investigations by the Internal Affairs Office of the Wellesley Police Department, the Wellesley Department of Social Services, and the District Attorney of Norfolk County, Massachusetts. The accusation and resulting investigations drew significant media attention. Each investigation concluded that Officer Yanco did not engage in any misconduct, and at the time of his death, Officer Yanco was aware of the results of at least two of the investigations. Such a false accusation proved traumatic, devastating and insufferable.

Prior to this incident, Officer Yanco endured many challenges with unusual courage and optimism, including a successful fight against cancer, and experienced no job related stress or any other stress that would contribute to psychological problems (Pet. App. 19a). Despite Officer Yanco's prior history of resolve, he sustained an injury from the false accusation in the form of an immediate and severe disturbance to his mental faculties. This injury led him to suffer from Post Traumatic Stress Disorder ("PTSD"), Major Depression, and Ego Constriction (Pet. App. 26a.) while exhibiting a vast majority of related symptoms. He "suffered pervasive mood disturbances that resulted in crying spells, loss of sleep, appetite and the capacity for enjoyment." Ms. Yanco urged her husband to seek professional help, but he refused. (Pet. App. 6a.)

Despite learning that he had been cleared of any risk of criminal charges and that a state investigation would not be pursued, on June 22, 1992, Officer Yanco was sent home early by his supervisor due to his deteriorated mental state, leaving on his computer a note for his wife and another note for his children who were out of state at the time. After reaching his home at about 2:00 p.m., the complications from Officer Yanco's injury led him to suicide by gunshot (Pet. App. 6a.) after he descended into a near catatonic state while

on a recorded telephone line with the Wellesley Police Department. The last 18 minutes of Officer Yanco's life were recorded. (Pet. App. 22a.)

After Officer Yanco's death, his widow, Pamela Yanco, applied to the Town for acceleration of pension benefits due to death in the line of duty (Pet. App. 6a.). Mrs. Yanco submitted an exhaustive report by a noted forensic psychiatrist specializing in work related PTSD, Dr. Laurie W. Raymond (Pet. App. 24a.). The Town, in a position adverse to Mrs. Yanco, hired an independent nationally recognized psychologist to review the claim, Dr. Ronald Ebert. The analysis of both experts included listening to the recording of Officer Yanco's last minutes and both independently found that Officer Yanco suffered an injury in the line of duty (namely, the false accusation), that the false accusation caused Officer Yanco to develop PTSD and major depression, that the false accusation and subsequent mental injuries were the direct and proximate cause of Officer Yanco's death, and that Officer Yanco did not have the capacity to act intentionally in bringing about his own death. Based primarily upon the report of its own expert, the Town Retirement Board found that Officer Yanco died in the line of duty and awarded his widow the pension benefits (Pet. App. 23a.).

Mrs. Yanco, on behalf of herself and her children, also filed a notice of claim for death benefits under the PSOBA. (Pet. App. 24a.) Mrs. Yanco submitted all materials from the Town proceeding, including the reports of Drs. Raymond and Ebert and a copy of the police tape recording. Without obtaining any additional expert testimony, the PSOB Office denied the claim by notice dated October 26, 1993 (Pet. App. 24a.). On November 23, 1993, Mrs. Yanco appealed that denial to a PSOB hearing officer (Pet. App. 24a.). Mrs. Yanco filed an additional psychiatric report of Dr. James

Beck, a forensic psychiatrist regarded on a national basis as one of the foremost experts on PTSD which agreed with the findings of Drs. Raymond and Ebert. A hearing was held before PSOB Hearing Officer, Jack Nadol, on November 9, 1995 (Pet. App. 24a.) Both Drs. Beck and Raymond personally appeared and testified at the hearing, and no other expert testimony was obtained. In a meticulous and lengthy, well-reasoned decision issued on December 6, 1995, Hearing Officer Jack Nadol found that Officer Yanco, a man of great resolve and fortitude, while performing his duties as Youth Officer was the victim of a false accusation of sexual misconduct with a minor boy that amounted to a "traumatic, devastating," event which within a short period of time crippled his ability "to distinguish right from wrong," and caused an "ego constriction". "In the end, his thinking constricted to the point where he could only conceive of one, irrational way to end the torture: to take his own life." Hearing Officer Nadol also found that "[k]illing himself was secondary to stopping the torture." In addition, after eliminating, one-by-one, other possible sources of distress, the Hearing Officer found "the allegation of sexual misconduct alone led to Yanco's mental injuries."

Pursuant to an analysis based on the criteria dictated in 28 C.F.R. §32.8 for determining intent and based upon the reports and testimony of the three expert witnesses, the Hearing Officer found that Officer "Yanco's suicide was unintentional" and that "he could not control the impulse to kill himself". The Hearing Officer further found that the PSOBA "covers personal mental, as well as physical, injuries sustained by a police officer in the line of duty". He further concluded that the PSOBA "does not exclude compensation in the cases of suicide". While addressing all the remaining elements of the PSOBA and regulations, the Hearing Officer determined that his suicide was the result of a traumatic injury sustained in the line of duty and was an unintentional act.

On August 23, 1996, the PSOB Office appealed the Hearing Officer's decision to the Director on the grounds of failure to obtain additional objective expert testimony (Pet. App. 27a.). The Director accepted the appeal on the same date, and Mrs. Yanco filed a submission on September 21, 1996, which questioned the procedural irregularity of the appeal and stated that Dr. Ebert should be treated as an objective psychological expert. In a two-page decision finally issued on February 20, 1997, the Director reversed the Hearing Officer's determination (Pet. App. 27a, 28a.). There is no indication that any further expert opinion was obtained.

Mrs. Yanco appealed the Director's decision to the Claims Court, which granted summary judgment to the US by decision dated January 18, 2000, thereby affirming the Director's decision (Pet. App. 17a.). As a direct result, Mrs. Yanco filed an appeal to court of appeals which affirmed the lower court decision by its decision dated July 24, 2001. (Pet. App. 1a.)

REASONS FOR GRANTING THE WRIT

I This case involves an issue which is currently vital to the potential public safety of our nation after September 11th.

An injury to one officer over nine years ago may no longer rise to the level of concern after the calamity of September 11th which led to the death of such an incomprehensible number of public safety officers. Further, Officer Yanco's injury may be unique and the risk of another officer sustaining the precise injury is likely small. However, it is vital to all Americans at this time that the focus and commitment of the nation's public safety officers not be at risk from even a limited erosion of confidence in such a critical remedial program as the PSOBA. Officers rely upon the PSOBA to

provide their surviving family members with unchallenged access to additional financial security regardless of the form of injury that may be sustained in the line of duty, while the nation is now relying more than ever upon each and every officer. Requiring an injury to fall solely within a physical category for eligibility may well affect an officer's peace of mind and lead to distraction or hesitation as new and unusual risks of injury are encountered that may not so clearly present themselves as physical injuries. This case merits the Court's immediate review precisely because the ruling of the court of appeals opens the door to additional risk at the worst possible time by establishing a separate category of injuries which are disqualified from the benefits of the PSOBA even if sustained in the line of duty.

Mental injuries such as that sustained by Officer Yanco are not the only injuries which may fall outside of the category involving physical assault or trauma to the body from an external source. For example, if a public safety officer died as a result of complications from vomiting after viewing mass destruction in the performance of his duty, would he have sustained an injury within the eligible category? If an officer had an allergic reaction to airborne particles inhaled from the World Trade Center on September 11th, can his family have certainty that the BJA would consider the officer to have sustained an injury involving physical assault or trauma to the body? Would the BJA be more likely to deny the claim as an "occupational disease" under 28 CFR § 32.2(i) or assert that he died of natural causes citing Smykowski v. U.S., 647 F. 2d 1003 (1981)?

Further, there is no rational reason for establishing separate categories of injuries. It seems out of touch with modern technology to even question whether the word "injury" could exclude sources which merely cause disturbance to the mental faculties since the United States

Armed Forces maintain separate "Psychological Operations" units for the express purpose of attacking by disturbing the enemy's mental faculties. "PSYOP" battalions were deployed in Panama and used rock music as a weapon to psychologically attack General Manuel Noriega and his guards in his compound. *See* *http://www.pipeline.com/~psywarrior/panama.html* and *http://www.army.mil/cmh-pg/documents/panama/unitlst.htm*. New forms of weaponry are appearing which do not leave physical evidence of assault or trauma to the body. An example of this technology is the ultrasonic acoustic weapon which generates sound waves that can cause either physical injury or disturbance to mental faculties depending upon the nature and intensity.[1] *See* *http://bbcr.uwaterloo.ca/~xjqiu/radio_wapon.html. See also* *"Sound as a Weapon", Victor DiBona, September 17, 1999,* *http://www.anomalous-images.com/messages/46.html.* Radio frequency is another controversial technology that could be misused to cause widespread injury and death involving disturbance to mental faculties. *See "New Face of Terrorism: Radio-Frequency Weapons", Eric Rosenberg, c. 1997 Hearst Newspapers,* http://bbcr.uwaterloo.ca/~xjqiu/radio_wapon.html.

The ruling of the court of appeals narrowing the definition of injury may well compel the BJA to deny claims predicated upon injuries to the extent sonic or radio frequency disruptions leave no apparent physical evidence?

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[1] Officer Yanco initially sustained his injury from sound waves which carried the verbal component of the accusation. Even from a historical perspective, denying the existence of an injury from an assault by words flies in the face of the time honored phrase: the pen is mightier than the sword.

II This Case Presents The Most Suitable Opportunity For Review Of A Question With Important National Security Implications Because There Are So Few Cases Involving Interpretation Of The PSOBA Appealed Beyond The Claims Court And Because Of The Unique Nature Of The Claims Court Record.

This case is ideally suitable as a vehicle for this Court to review the question presented in order to address the larger and more immediate risk to the nation. First and most critically, this case is before this Honorable Court now. No case involving the BJA's application of the PSOBA has ever been previously reviewed by this Court.[2] The court of appeals has published only two other opinions involving the PSOBA.[3] In the event that this case does not appear to present the ideal non-physical injury as a basis to grant the petition for review of the underlying issues, the absence of a history of prior cases involving the PSOBA at this level should dissuade any consideration of waiting for a future case. Furthermore, Officer Yanco's death occurred over nine years ago. Waiting even one year for a more perfect case could result in irreparable harm to the nation.

Second, this case presents a substantial and well documented record which was presented in the claims court proceeding. Remarkably, the last eighteen minutes of Officer Yanco's life were recorded on a police emergency line and

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[2] Rose v. U.S., 479 U.S. 1, 107 S.Ct. 334 was decided in 1986, but only involved review of a state statute which was impacted by the PSOBA.

[3] Chacon v. U.S., 48 F.3d 508 (1995) which ruled that prisoners on work detail fighting fires were not public safety officers and Greeley v. U.S., 50 F.3d 1009 (1995) which dismissed a case in which the claimant made no effort to provide evidence of an injury.

that audio recording and a BJA transcript are included in the record. (Pet. App. 22a.) It is highly unlikely that this Court will be presented with another case which offers this level of evidence where death results from a mental injury or from any other type of non-physical injury. The BJA also compiled an extensive indexed program office binder which was made a part of the record. Furthermore, the BJA made no separate psychiatric investigation at any stage of the proceedings while the Petitioner engaged the services of two recognized psychiatrists in the area of post traumatic stress disorder. The record includes an exhaustive written report of their investigation. Both of Petitioner's experts testified before the BJA Hearing Officer and the transcript of that hearing is included within the record. The Town of Wellesley, in a position adverse to the Petitioner, hired an independent nationally recognized psychologist to review the claim in connection with its determination in support of state line of duty benefits.[4] Accordingly, this is a case which is entirely free of conflicting experts. This is also a case where the Hearing Officer found in favor of payment of the benefit and was overruled by the BJA Director.

Third, this case also presents a unique set of circumstances whereby the mental injury has been isolated as the exclusive cause of the injury[5] without challenge by the BJA nor has it been raised as an issue that the accusation was sustained in the line of duty. The case is free of any other conflicting issues of fact of a material nature. If the court of

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[4] Based primarily upon the report of its own expert, Dr. Ronald Ebert (who has extensive credentials and a national reputation, the Town Retirement Board awarded his widow the state benefit of pension acceleration (Pet. App. 23a.).

[5] The injury is also exclusively traced to a criminal act (since effectively false reports were filed with the police department and the district attorney's office).

appeals ruling is allowed to stand without review, this Court's silence will leave the BJA to vigorously challenge all future cases involving injury falling outside of the court of appeals definition. Factual disputes are likely to exist as a barrier to further opportunity for judicial review despite a more ideal form of injury and the Court cannot conduct de novo review. Davis v. United States, 461 Fed.Cl. 421 (2000).

III Certiorari Is Warranted Because The Decision Below Conflicts With Decisions of This Court.

The BJA's interpretation of its regulations was upheld by the court of appeals on the basis of Chevron USA v. National Resources Defense Council, 467 U.S. 837, 81 L.Ed2d 694, 104 S.Ct 2778, rehearing denied, 468 U.S. 1227, 82 L.Ed.2d 921, 105 S.Ct. 28, 105 S.Ct. 29 (1984). However, the Chevron deference rule should not apply in this case. This Court ruled in Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (May 1, 2000) that Chevron should not apply to an agency's post hoc reasoning to interpret the meaning or application of a statute. 28 C.F.R § 32.4 states that the Bureau "shall resolve any reasonable doubt arising from the circumstances of the officer's death. . .in favor of payment of the death. . . benefit." Chevron deference should not apply to an agency's interpretation of ambiguities within its own regulations, especially where the agency's interpretation of its regulations results in a conflict between them. 28 CFR § 32.8 continues to expressly apply when an officer takes his own life. The BJA has ignored § 32.8 and the ruling of the court of appeals did not provide any response to the Petitioner's arguments in support of the exclusive application of this regulation to the circumstances of Officer Yanco's death. 28 CFR § 32.5 requires the BJA to give substantial weight to the findings of fact of state and local agencies. The BJA did not adhere to this regulation in denying the Petitioner's claim. Interestingly, in Davis, *supra*, at 208-209, the Court held that

this regulation bound the BJA to follow the ruling in the state pension proceeding where the state language was substantially similar to the operative text of the PSOBA.[6]

Moreover, the concept of "personal injury" is not "a creature of the [agency's] own regulations" Auer v. Robbins, 519 US 452 at 461 (1997) but rather goes to the essence of the statute. By arguing that the definitions under its regulations exclude any form of mental injury, the BJA is not attempting to interpret their regulations so much as they are attempting to amend the PSOBA. The agency's ". . .position is in [every] sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." Auer, at 462. Prior to the BJA Director's reversal of this case, there was no statement of any nature from the agency relating to the definition of mental injury. The BJA had no "specialized experience and broader investigations and information" available to it as to the issue of defining the meaning of personal injury as it conducted no investigation of the issue whatsoever even in connection with this case. U.S. v. Mead, 121 S.Ct. 2164, 2167 (2001). The BJA merely took a position in litigation over an issue of first impression.

Finally, even an express delegation of rulemaking authority by Congress does not extend to use of that authority to establish rules which are ". . .arbitrary or capricious in substance, or manifestly contrary to the statute." Mead, *supra* at 2166. The BJA misused that authority to include mental injury within "stress and strain" under 28 CFR § 32(g) while simultaneously excluding it from "personal injury" under §

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[6] Officer Yanco's death met the eligibility standards of Mass. G.L. c. 32, § 9, which are exactly the same as those under the PSOBA since Massachusetts law requires a ". . .personal injury sustained. . .while in the performance of, his duties. . .without serious and wilful misconduct on his part. . ."

32(e) and the PSOBA itself. Also, the PSBOA is not wholly silent as to the issue of mental injury. 42 U.S.C. § 3796b(4) refers to a "disturbance of mental or physical faculties". Thus, Congress explicitly showed it's awareness of the hazard of injury to mental faculties within the text of the statute even though no express exclusion exists elsewhere in the PSOBA. Further, Congress added the definition of "catastrophic injury" in § 3796b(1) and amended that provision again to simply remove the term "personal". The fact that Congress took it upon itself several times to amend definitional sections of the PSOBA without making any reference to the term injury is a powerful argument that Congress didn't intend to delegate rulemaking authority to further refine definition of the text.

Furthermore, the BJA's interpretation failed to take into account precedent of this Court under Consolidated Rail Corp. v. Gottshall v. Carlisle, 512 U.S. 532 (1994) which interpreted the Federal Employers' Liability Act ("FELA") at 45 USC § 51. FELA also uses the term "injury" without definition on the basis of a nexus to employment, although recovery is limited to injuries caused by negligence of a railroad carrier without mentioning negligent infliction of emotional distress. This Court held that it is the proper forum to decide ". . . whether, and to what extent, this new category of claims should be cognizable under the statute." Id. at 541. The Court noted that "FELA is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms" and that unless "common law principles. . .are expressly rejected in the text of the statute, they are entitled to great weight. . . ." Id. at 544. The Court then concluded: "Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision."

In light of that silence, this Court ruled:

> A right to recover for negligently inflicted emotional distress was recognized in some form by many American jurisdictions at the time FELA was enacted, . . . and this right is nearly universally recognized among States today. . . . Moreover, we have accorded broad scope to the statutory term "injury" in the past in light of FELA's remedial purposes. . . . We see no reason why emotional injury should not be held to be encompassed within that term, especially given that "severe emotional injuries can be just as debilitating as physical injuries."

Consolidated Rail, *supra* at 550.

This Court further stated:

> "[W]hen the statute was enacted," it is true, "Congress' attention was focused primarily upon . . . accidents on interstate railroads," . . .But "accidental injuries were not the only ones likely to occur," and Congress chose "all-inclusive wording." "To read into [language as broad as could be framed] a restriction [tied] to . . . the particular sorts of harms inflicted," . . . "would be contradictory to the wording, the remedial and humanitarian purpose . . . of the Act. . ."

Consolidated Rail, *supra* at 561.

Where the PSOBA is founded on the common-law concepts of "injury" and "line of duty" which are embodied in the workers' compensation laws of all fifty states and the District of Columbia, Consolidated Rail should apply equally to any review of the PSOBA. Where the PSOBA provides no

definition[7] or qualifications to the term "personal injury", common-law principles should govern its meaning. Although Congress' attention may have been focused on physical forms of death and injury while debating the PSOBA, Congress was well aware of the risks of mental injury. Yet, similar to FELA and almost 70 years after FELA, Congress chose to use the all-inclusive term "personal injury" to describe the eligible harms covered by the PSOBA. There is no valid reason why this Court's reasoning in Consolidated Rail shouldn't be applied to this case to encompass mental injury of the nature suffered by Officer Yanco.

IV Certiorari Is Warranted Because The Court of Appeals Decision Below Presents An Issue Of Uniformity In The Interpretation Of Federal Remedial Statutes.

This case presents an important national question relating to uniformity. A significant number of Federal remedial statutes are written on the basis of a similar benefit scheme involving the twin tests of injury and nexus to a covered activity based upon either employment or line of duty such as Veterans' Benefits under 38 USC § 1110 based upon the twin tests of death or "personal injury suffered. . . in line of duty" and the Federal Employees' Compensation Act under 5 U.S.C. § 8102 which uses ". . .personal injury sustained while in the performance of his duty." The court of appeals ruling leaves the PSOBA as the only remedial statute which uses the same or substantially similar wording without exclusions where the word "injury" is now interpreted to exclude mental injury. There is no justification provided by the court of appeals to explain this lack of uniformity.

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[7] Other than to the extent of 3796b(1) and 3796b(4) as discussed above.

V Certiorari Is Warranted Because the Court of Appeals Decision Below Contains Material Errors And This Case Is Cited As Precedent In Subsequent Cases.

A Error In Workmen's Compensation Analysis

In its Reply Brief to the court of appeals, Petitioner presented a chart summarizing the workmens' compensation laws of all fifty states and the District of Columbia in order to demonstrate that the twenty states that either excluded mental injury entirely or required a physical predicate to a mental injury did so on the basis of an express statutory exclusion or requirement. In the case of all state statutes which do not define or otherwise limit the term "injury", the chart cites cases where benefits are payable for mental injuries without a physical predicate (and also noted those cases where the injury led to suicide). The court of appeals failed to address this argument in any manner whatsoever. Rather, the court of appeals cited a few state cases[8] which required a physical predicate to a mental injury without ever alluding to the express statutory exclusion or requirement and then used this flawed analysis to ". . .conclude that Congress has not 'directly spoken' to the question of whether the term 'personal injury' in 42 U.S.C. § 3796(a) includes mental strain." (Pet. App. 11a.) This erroneous analysis is now being cited as precedent in PSOBA cases such as Davis v. U.S., 50 Fed. Cl. 192, at 199 (2001). The same analysis was cited in Demutiis v. U.S., 48 Fed.Cl. 81, 92-93 (2000), citing the same reasoning in the claims court ruling (Pet. App. 36a.-37a.). Review by this Court is necessary in order to prevent the further perpetuation of this erroneous ruling.

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[8] Including, inexplicably, compounding its error by citing the wrong conclusion from a Massachusetts case. *See following section.*

B Error In Quotation Taken From Fitzgibbons'.

The court of appeals included in its list of cases requiring a physical predicate to a benefit for mental injury In re Fitzgibbons' case, 373 N.E.2d 1174, 374 Mass 633 (1974). (Pet. App. 11a.) The court of appeals quoted language from Fitzgibbons' at 1177 which indeed described a physical predicate to inclusion of mental injuries under the state workmens' compensation statute. This case was presented in Petitioner's Brief because it involved a similar case of work related events leading to a major depressive disorder which resulted in the employee's suicide. Remarkably though, the fact pattern makes no mention whatsoever of any form of physical injury to the claimant. On page 1177, the Massachusetts Supreme Judicial Court provided a lengthy retrospective of the development of the law in the area and began the discussion with the language quoted in the court of appeals ruling citing supporting cases from 1915 through 1976. However, the Massachusetts court concluded the history by ruling as follows:

> We conclude that the term "personal injury" also permits compensation in cases involving mental disorders or disabilities causally connected to mental trauma or shock arising "out of the employment looked at in any of its aspects. . . .There is no valid distinction which would preclude mental or emotional disorders caused by mental or emotional trauma from being compensable. . . In this case, the claimant's expert specifically found that the single traumatic event caused a psychotic depressive reaction. Thus, there is in this case a mental injury resulting from a stress greater than the ordinary stresses of everday work.

Id. at 1177.

Review by this Court is further necessary to prevent the potential of further perpetuation of an erroneous ruling of the court of appeals.

C Error In Relying Upon Legislative History From a Superceded Version of the Act.

The court of appeals analyzed the legislative history of the PSOBA (Pet. App. 11a-13a) and used an analysis to find Congress' clear intent "to have the statutory term 'personal injury' include mental strain." The ruling principally drew from House Judiciary Reports, yet the court of appeals ignored Petitioner's citation to Harold v. US, 634 F2d, 547, at 552 (1980) when it also quoted from The House Report on H.R. 366: "The Internal Revenue Service has advised the Committee that the benefit provided under the legislation "could be regarded as benefits received under a statute which is in the nature of a Workmen's Compensation Act and as such would be excludable under Section 104(a)(1) of the (Internal Revenue) Code." The Harold court held that this excerpt from the House report indicates that Congress considered the PSOBA to be "in the nature of a Workmen's Compensation Act."

Curiously, all of the legislative history from House and Senate versions of the bill which were both superceded by a Conference Committee version incorporating both a Senate amendment and an even broader conference amendment. Each of these amendments substantially changed the basis of injury eligible for benefits. This is noted for the first time in Davis v. U.S., 50 Fed.Cl. 192, at 198 (2001), which concludes that only comments in the report accompanying the conference version of the final bill should be accorded weight.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
00-5058

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PAMELA H. YANCO,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

July 24, 2001, Decided

COUNSEL:
Jeffrey L. Allen, of Wellesley Hills, Massachusetts, argued for plaintiff-appellant.

Kyle E. Chadwick, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were David M. Cohen, Director; Kathryn A. Bleecker, Assistant Director; and Elizabeth W. Newsom, Attorney. Of counsel on the brief were Gregory C. Brady, Deputy General Counsel; and Lila Sultan, Attorney Advisor, Office of the General Counsel, Office of Justice Programs, Department of Justice, of Washington, DC.

JUDGES:
Before SCHALL, GAJARSA, and LINN, Circuit Judges.

OPINION BY:
SCHALL

OPINION:

SCHALL, Circuit Judge.

Pamela H. Yanco is the widow of William Yanco, who served as a public safety officer with the Wellesley, Massachusetts police force. Following her husband's death by suicide, Ms. Yanco submitted a claim to the Department of Justice's Bureau of Justice Assistance ("BJA") seeking death benefits under the Public Safety Officers' Benefits Act of 1976 (the "Benefits Act" or "Act"), Pub. L. No. 94-430, 90 Stat. 1346 (codified as amended at *42 U.S.C. § § 3796*-3796c (1994)). After BJA denied her claim, Ms. Yanco brought suit in the United States Court of Federal Claims.

In due course, the parties cross-moved for summary judgment based upon the administrative record. After considering the motions, the Court of Federal Claims granted summary judgment in favor of the government and dismissed Ms. Yanco's complaint. The court ruled that recovery under the Benefits Act was barred because Officer Yanco had not died as the result of a "personal injury" within the meaning of the statute, as interpreted by BJA regulations. *Yanco v. United States, 45 Fed. Cl. 782, 792-93 (2000).* We affirm.

BACKGROUND

I.

The Benefits Act provides a one-time cash payment to survivors of public safety officers who die in the line of duty. Section 3796(a) states in pertinent part:

> In any case in which the Bureau of Justice Assistance . . . determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained

in the line of duty, the Bureau shall pay a benefit of $ 100,000. . . as follows:

> (1) if there is no surviving child of such officer, to the surviving spouse of such officer;
>
> (2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;
>
> (3) if there is no surviving spouse, to the child or children of such officer in equal shares; or
>
> (4) if none of the above, to the parent or parents of such officer in equal shares.

42 U.S.C. § 3796(a) (1994). For a survivor or survivors to qualify for the payment, the public safety officer (1) must have suffered a "personal injury" within the meaning of the Act, (2) the injury must have been suffered "in the line of duty," and (3) the death must have been "the direct and proximate result" of the personal injury.

Section 3796a sets forth specific restrictions upon entitlement. It provides as follows:

No benefit shall be paid under this subchapter -

(1) if the death or catastrophic injury was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death or catastrophic injury;

(2) if the public safety officer was voluntarily intoxicated at the time of his death or catastrophic injury;

(3) if the public safety officer was performing his duties in a grossly negligent manner at the time of his death or catastrophic injury;

(4) to any individual who would otherwise be entitled to a benefit under this subchapter if such individual's actions were a substantial contributing factor to the death or catastrophic injury of the public safety officer; or

(5) to any individual employed in a capacity other than a civilian capacity.

42 U.S.C. § 3796a (1994). Among other things, § 3796a prohibits the payment of benefits to the dependents of an officer who intentionally brings about his or her own death.

Under *42 U.S.C. § 3796c*(a), BJA is "authorized to establish regulations and procedures as may be necessary to carry out the purposes of this subsection." Pursuant to this authority, regulations have been promulgated to implement the Benefits Act. In the regulations, "personal injury" is defined as "any traumatic injury, as well as diseases which are caused by or result from such injury, but not occupational diseases." *28 C.F.R § 32.2(e)* (1997). "Traumatic Injury" is defined as "a wound or the condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain." *28 C.F.R. § 32.2(g)* (1997). Thus, the regulations exclude stress and strain from the definition of "personal injury."

II.

The pertinent facts are not in dispute. William Yanco was a member of the Wellesley, Massachusetts police force from 1971 until his death in 1992. He served as a Safety Officer, a Drug Abuse Resistance Education Officer, and a Youth Officer. In all three positions he designed programs to promote child health and safety and prevent juvenile delinquency. *Yanco, 45 Fed. Cl. at 783.* As part of his authorized duties as a Youth Officer, Officer Yanco counseled troubled children and their families, often in their homes. Id.

On May 28, 1992, the mother of a ten-year old boy whom Officer Yanco was counseling accused Officer Yanco of engaging in sexually inappropriate behavior with the boy. Officer Yanco immediately reported the allegation to his supervisor, and there ensued investigations by the Internal

Affairs Office of the Wellesley Police Department, the Wellesley Department of Social Services, and the District Attorney of Norfolk County, Massachusetts. *Id. at 784.* The accusation and resulting investigations drew significant media attention. Id. Each investigation concluded that Officer Yanco did not engage in any misconduct, and at the time of his death, Officer Yanco was aware of the results of at least two of the investigations. Id.

In the wake of the allegation against him, Officer Yanco "appeared acutely distressed." Id. He "suffered pervasive mood disturbances that resulted in crying spells, loss of sleep, appetite and the capacity for enjoyment." Id. Ms. Yanco urged her husband to seek professional help, but he refused. *Id. at 785.*

On June 22, 1992, Officer Yanco left work early, leaving on his computer a note for his wife and another note for his children. At about 2:00 pm, he telephoned the Police Department from his home. While on the phone, he fatally shot himself. Id.

III.

Following her husband's death, Ms. Yanco applied to the Town of Wellesley Retirement Board for pension benefits, basing her claim on the ground that her husband's death had occurred in the line of duty. Id. A psychologist and a psychiatrist submitted reports in support of the claim, stating that Officer Yanco's suicide was causally related to his work as a police officer. Id. Based on these reports, on August 26, 1993, the Board held that Officer Yanco had died in the line of duty, entitling his widow to benefits. *Id. at 785-86.* The Massachusetts Division of Public Retirement Administration affirmed the Wellesley Retirement Board's decision on September 20, 1993, and awarded state pension benefits to Ms. Yanco. *Id. at 786.*

On June 9, 1993, Ms. Yanco filed a claim for death benefits with the Public Safety Officers' Benefits Act Office ("PSOBO"), a unit of BJA. PSOBO denied her claim on October 26, 1993, and Ms. Yanco filed a notice of appeal. Id. In accordance with BJA regulations, the matter was referred to a Hearing Officer, who received evidence and held a hearing.[1] On December 6, 1995, the Hearing Officer rendered a decision in which he determined that Officer Yanco's suicide was the result of an injury sustained in the line of duty, entitling his widow to benefits. *Id. at 787.* In reaching his decision, the Hearing Officer concluded: "Officer Yanco's post traumatic stress disorder and major depression qualify as personal injuries. That is, they were traumatic injuries, wounds inflicted upon his mind, triggered by the allegation of sexual misconduct, an external force." He also concluded that Officer Yanco's impaired mental state rendered his suicide unintentional. On review, however, the Director of BJA reversed the Hearing Officer's decision.[2] In a decision dated February 18, 1997, the Director concluded that the term "traumatic injury" in BJA's implementing regulations does not encompass stress. As a result, the Director stated: "Officer Yanco's 'injury' is not encompassed within the definition of 'personal injury,' and is therefore not cognizable under the [Benefits] Act." *Id. at 788.* The Director also concluded that Officer Yanco's death was not sustained "in the line of duty," as required by § 3796(a), because, when Officer Yanco shot himself, he was not performing an action which he was "obligated or authorized by rule, regulations, condition of employment or service, or law to perform." *28 C.F.R. § 32.2(c)(1)* (1997); see also *Yanco 45 Fed. Cl. at 788.* The Director further concluded that, even if Officer Yanco's death could be viewed as a result of traumatic injury, benefits would not be payable to Ms. Yanco because of the prohibition in the Benefits Act against paying benefits when an officer's death is intentional. *Yanco, 45 Fed. Cl. at 788.*

IV.

Ms. Yanco timely filed suit in the Court of Federal Claims to challenge BJA's denial of her claim under the Benefits Act. As noted above, in due course, the parties cross-moved for summary judgment based upon the administrative record. In considering the summary judgment motions, the court accorded deference under *Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, to BJA's construction of the term "personal injury" in *42 U.S.C. § 3796*(a). Id. at 792. The court concluded that Ms. Yanco had not carried her burden of establishing that BJA's determination that post traumatic stress disorder and depression were encompassed by the exclusionary language "stress and strain" in *28 C.F.R. § 32.2(g)* was unreasonable. Id. Because, in its regulations, BJA has interpreted "personal injury" as excluding "stress and strain," the court concluded that Officer Yanco's death by suicide did not result from a "personal injury" within the meaning of the Act. Id. The court therefore granted summary judgment in favor of the government and denied Ms. Yanco's motion, thereby upholding BJA's denial of Ms. Yanco's claim for death benefits.

We have jurisdiction over Ms. Yanco's appeal pursuant to *28 U.S.C. § 1295*(a)(3) (1994).

DISCUSSION

I.

Judicial review of BJA's denial of a claim for death benefits under the Benefits Act is limited to three inquiries: (1) whether there has been substantial compliance with statutory requirements and with the requirements of implementing regulations; (2) whether there has been any arbitrary or capricious action on the part of the government officials involved; and (3) whether the decision denying the

claim is supported by substantial evidence. *Chacon v. United States, 48 F.3d 508, 511 (Fed. Cir. 1995).*

Ms. Yanco's principal argument on appeal is that, in denying her claim under the Act, BJA misapplied the statute. She contends that the term "personal injury" in *42 U.S.C. § 3796*(a) includes mental injuries, such as post traumatic stress disorder and depression, and that the Court of Federal Claims therefore erred in according Chevron deference to the BJA regulations at *28 C.F.R. § § 32.2(e)* and 32.2(g) which define "personal injury" to exclude stress and strain. Ms. Yanco's argument - that these regulations are contrary to the Benefits Act - presents an issue of statutory construction, a matter of law that we review de novo. *Doyon, Ltd. v. United States, 214 F.3d 1309, 1314 (Fed. Cir. 2000).*

"Administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp., 150 L. Ed. 2d 292, 121 S. Ct. 2164, 2171 (2001).* Congress has expressly delegated to BJA the task of promulgating regulations to implement the Benefits Act. See *42 U.S.C. § 3796c*(a); *42 U.S.C. § 3796*(c). The regulations at issue in this case, those set forth at *28 C.F.R. § § 32.2(e)* and 32.2(g), were promulgated in the exercise of that authority. See *28 C.F.R. § 32.1* (1997). BJA's implementing regulations thus qualify for Chevron deference.

Under Chevron, two questions must be addressed. The first is "whether Congress has directly spoken to the precise question at issue." *Chevron, 467 U.S. at 842.* "If the intent of Congress is clear," both the court and the agency involved "must give effect to the unambiguously expressed intent of Congress." *Id. at 842-43.* If, however, the court determines that "the statute is silent or ambiguous with respect to the

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id. at 843.*

The "precise question at issue" in this case is whether the term "personal injury" in *42 U.S.C. § 3796*(a) includes mental strain.[3] Ms. Yanco recognizes that "personal injury" is not defined in the statute. She argues, however, that Congress has effectively spoken to the meaning of "personal injury" because the term has a common meaning that includes mental strain. See *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 117 L. Ed. 2d 581, 112 S. Ct. 1344* ("Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (citing *Kelley v. S. Pac. Co., 419 U.S. 318, 322-323, 42 L. Ed. 2d 498, 95 S. Ct. 472 (1974)).* She contends that this common meaning is used in state workmen's compensation laws and in connection with veterans' benefits. Thus, she points to the Massachusetts workmen's compensation law for its inclusion of mental injuries as work related personal injuries. See *In re Fitzgibbons' Case, 374 Mass. 633, 373 N.E.2d 1174, 1177 (Mass. 1974)* (concluding that the term "personal injury" permits compensation in cases involving mental disabilities causally connected to mental trauma or shock arising out of any aspect of employment). She also points to *38 C.F.R. § 3.304(f)* (1997), a regulation promulgated by the Department of Veterans Affairs pursuant to its authority under *38 U.S.C. § 501* (1994). Under § 3.304(f), post traumatic stress disorder may qualify as a service-connected injury.

We are not persuaded by Ms. Yanco's arguments. To begin with, it appears that, as far as state workmen's compensation laws are concerned, the term "personal injury" may or may not be limited to physical injuries. See, e.g., *Demars v. Rickel, 223 Kan. 374, 573 P.2d 1036, 1040 (Kan.*

1978) (holding that "personal injury" within the meaning of the Kansas workmen's compensation law requires a change in the physical structure of the body); see also *Swan v. Williamson, 74 Idaho 32, 257 P.2d 552, 555 (Iowa 1953)* (holding that "personal injury" within the meaning of Iowa's workmen's compensation law requires violence to the physical structure of the body). Even Massachusetts, a state that does include mental injuries as part of its workmen's compensation scheme, only includes "mental and nervous disorders arising out of employment where such injuries are the result of physical trauma, no matter how slight the impact." *Fitzgibbons, 373 N.E.2d at 1177.*[4] Finally, analogous regulatory schemes, such as the one relating to veterans' benefits, are simply representative of one possible reading of the term "personal injury." Accordingly, we conclude that Congress has not "directly spoken" to the question of whether the term "personal injury" in *42 U.S.C. § 3796*(a) includes mental strain.

Turning to the second prong of the Chevron analysis, we must determine whether BJA's decision to define "personal injury" as "any traumatic injury," *28 C.F.R § 32.2(e)*, and then to exclude from the definition of "traumatic injury" stress and strain, *28 C.F.R. § 32.2(g)*, represents "a permissible construction of the statute." *Chevron, 467 U.S. at 843.* For the following reasons, we conclude that it does.

In originally promulgating the definitional regulations that are at issue here, the Law Enforcement Assistance Administration ("LEAA"), BJA's predecessor, stated:

> LEAA believes that the definition of "personal injury" in the House Judiciary Committee Reports manifests the Committee's intent to limit coverage to deaths caused by traumatic injuries. The Report language is consistent with the following definition of "trauma[:]" . .

> . "an injury caused by rough contact with a physical object; accidental or inflicted wound." The regulations, accordingly, have defined "traumatic injury" to mean "a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation and bacteria, but excluding stress and strain." . . . Deaths caused by traumatic injuries do not therefore include deaths directly attributable to exertion or stress encountered in the performance of duty, unless that stress resulted in or was caused by a traumatic injury that was a substantial factor in the officer's death.

42 Fed. Reg. 23,260 (May 6, 1977).

The legislative history supports the definition of the term "personal injury" in the regulations. The House Judiciary Committee Reports to which LEAA refers, House Reports Nos. 94-1031 and 94-1032 94th. Cong. 2d Sess., both contain the following statement:

> It is the Committee's intent that the term "personal injury" shall include all injuries to the body which are inflicted by an outside force, whether or not it is accompanied by physical impact, as well as diseases which are caused by or result from such injuries, but not diseases which arise merely out of the performance of duty. In other words, deaths from occupational diseases alone are not within the purview of this legislation.

H.R. Rep. No. 94-1031, at 4; H.R. Rep. No. 94-1032, at 5.

In the Senate, the bill that was favorably reported by the Judiciary Committee provided a death benefit to the survivor or survivors of an officer who died in the line of duty from "injuries directly and proximately caused by a criminal act or an apparent criminal act." S. Rep. No. 94-816, 94th Cong. 2d Sess. at 1, reprinted in 1976 U.S.C.C.A.N. 2504. However, an amendment was introduced on the Senate floor, substituting "as the direct and proximate result of a personal injury sustained in the line of duty" for the more limited "criminal act" language. Speaking in support of the amendment, Senator McClellan stated that the bill "is not health insurance; but it does provide for payment if an officer is killed in the line of duty, either by accident or by willful assault by a criminal." 122 Cong. Rec. S11837-38 (daily ed. July 19, 1976) (statement of Sen. McClellan). The amendment passed, and its language was incorporated into the final version of the Act.

The legislative history makes it clear that Congress's intent in enacting the Benefits Act was to provide a death benefit for the survivor or survivors of a law enforcement officer who dies as the result of what one would understand to be some kind of a physical assault or trauma to the body. Thus, the statements in the House Reports that are quoted above refer to "injuries to the body which are inflicted by an outside force." In short, the legislative history points away from an intent on the part of Congress to have the statutory term "personal injury" include mental strain. We thus conclude that the regulations at *28 C.F.R. § § 32.2(e)* and 32.2(g) which define the term "personal injury" so as to exclude stress and strain represent, in the words of Chevron, a "permissible construction of the statute." We therefore reject Ms. Yanco's challenge to the regulations.[5]

The only question that remains is whether the decision of the BJA that Officer Yanco's suicide was the result of "stress

and strain" within the meaning of *28 C.F.R. § 32.2(g)* is supported by substantial evidence. There is abundant evidence in the administrative record that it was mental strain that led Officer Yanco to take his life. The record includes the written statement of Ms. Yanco and her hearing testimony. Ms. Yanco stated that, after the allegation was made against him, her husband withdrew from his family and became irritable and depressed. ("I would awaken during the night and find him gone from our bed. He would be down in the family room on the couch just staring into space or openly weeping.") The record also includes the written statements and hearing testimony of two mental health experts, Dr. James C. Beck and Dr. Laurie W. Raymond. Dr. Beck and Dr. Raymond concluded that, at the time of his death, Officer Yanco was suffering from post traumatic stress disorder and depression. BJA's decision is supported by substantial evidence.

II.

Ms. Yanco makes two additional arguments. As noted above, the Director of BJA concluded that Officer Yanco was not acting "in the line of duty," as required by *42 U.S.C. § 3796*(a) when he took his life. The Director also concluded that, even if Officer Yanco's death could be viewed as the result of "traumatic injury" within the meaning of *28 C.F.R. § 32.2(g)*, benefits would not be payable to Ms. Yanco because of the prohibition in the Benefits Act against paying benefits when an officer's death is intentional. Ms. Yanco challenges the Director's conclusion that Officer Yanco was not acting in the line of duty when he took his life. She also asserts that the Director acted arbitrarily and capriciously in reversing the Hearing Officer's determination that Officer Yanco lacked the intent to bring about his death. The issues of acting in the line of duty and intent only are relevant, however, if a law enforcement officer dies as the result of a "personal injury" within the meaning of the Act. See *42 U.S.C. § § 3796*(a) and 3796a. As discussed above, Officer Yanco did not die as

the result of such an injury. Ms. Yanco's additional arguments are thus unavailing.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims granting summary judgment in favor of the government and thereby sustaining BJA's denial of Ms. Yanco's claim for death benefits under the Benefits Act is

AFFIRMED.

COSTS

Each party shall bear its own costs.

Footnotes

[1] A claimant may request BJA to reconsider its finding of ineligibility. Upon request for reconsideration, BJA will provide the claimant with the opportunity for an oral hearing before a Hearing Officer. *28 C.F.R. § 32.24.*

[2] Pursuant to *28 C.F.R. § 32.24(h)(1)* (1997), the Director of BJA "may, on his or her own motion, review a determination made by a Hearing Officer."

[3] We use the term "mental strain" to include stress, strain, post traumatic stress disorder, and depression.

[4] In its decision sustaining BJA's denial of Ms. Yanco's claim, the Court of Federal Claims noted: "In the Hearing Officer's determination, he notes that the workmen's compensation laws of approximately 30 states compensate for mental injuries. The reasonable conclusion to be drawn from this assertion is that approximately 20 states do not compensate for mental injuries." *45 Fed. Cl. at 792 n.11.*

[5] Our conclusion is consistent with *Smykowski v. United States, 227 Ct. Cl. 284, 647 F.2d 1103 (Ct. Cl. 1981).* That case involved a claim under the Benefits Act by the survivors

of a police officer who collapsed and died as the result of a heart attack immediately following a struggle with an individual whom he was seeking to place in custody. The officer did not suffer any direct physical injuries from the struggle, however. The Court of Claims determined that the officer had not died as the result of a "traumatic injury," as defined in the regulations. It therefore sustained the denial of the claim for death benefits under the Act. Although the appellants in Smykowski did not challenge the validity of the regulations defining "personal injury," the court's observation about the regulations is worth noting: "Claimants do not take issue with the agency's position excluding stress, strain, and heart disorders from the coverage of the Act, exclusions which, in any event, are amply justified by the statutory language, legislative history, and medical statistics." *647 F.2d at 1105* (footnotes omitted).

No. 98-515C

UNITED STATES COURT OF FEDERAL CLAIMS

PAMELA H. YANCO,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

January 18, 2000, Filed

COUNSEL:
Jeffrey L. Allen, Wellesley Hills, Massachusetts, attorney of record for plaintiff.

Elizabeth W. Newsom, Washington, D.C., with whom was Acting Assistant Attorney General David W. Ogden, for defendant.

JUDGES:
LYDON, Senior Judge.

OPINION BY:
LYDON

OPINION:

LYDON, *Senior Judge*:

In this action, plaintiff challenges a determination by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (the Bureau), denying her and her children eligibility to receive death benefits under the Public

Safety Officers' Benefits Act, *42 U.S.C. § 3796* (1988 & Supp. III 1991) (PSOBA). Both parties have moved for summary judgment, and the administrative record has been filed with the Court.[1] For reasons set forth below, defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

Facts

1. Background Information

William Yanco served on the Wellesley, Massachusetts, police force for some 21 years, from 1971 until the day of his death on June 22, 1992. It is undisputed that at the time of his death Officer Yanco was married and had two children. Initially, Officer Yanco served as a patrol officer but was promoted to the position of Safety Officer in 1983. In 1989, Officer Yanco became the Drug Abuse Resistance Education (D.A.R.E.) Officer. In 1992, Officer Yanco became the Youth Officer.

As the Safety Officer, and thereafter as the D.A.R.E. and the Youth Officer, Officer Yanco designed programs to promote child health and safety and to prevent juvenile delinquency. Specifically, as the D.A.R.E. Officer, he taught drug resistence classes and presided over D.A.R.E. graduations. As the Youth Officer, he counseled troubled children and their families. As part of his authorized duties, Officer Yanco visited the homes of both troubled and untroubled children.

Officer Yanco "lived for his work," continually finding new ways to assist children and routinely dedicating extra hours to children in need. As an example, Officer Yanco created a D.A.R.E. student box where students deposited written questions they did not feel comfortable asking in class. He also installed a separate telephone line and answering machine in his office which enabled children to communicate with him privately and/or leave confidential

messages. Following Officer Yanco's death, the Wellesley Chief of Police found that it required two and a half officers to cover his duties.

Prior to June 22, 1992, family, friends, and colleagues viewed Officer Yanco as a gregarious and energetic person. He was described by them as a person who put the well-being of others, particularly children, before his own; a person who met all problems "head on" with optimism and, often, humor. For example, in the mid-1980's, when he was diagnosed with malignant melanoma and given a 50% percent chance to live, Officer Yanco faced this physical setback by educating himself on the disease, seeking aggressive treatment, and manifesting a resolve to live. By all accounts, service to youth was the core of his life and he was happiest when helping children. He took great pride in the fact that children responded to him, trusted him, and confided in him. Fellow officers and teachers fondly recalled how, at D.A.R.E. graduations, "Officer Bill" would be "swamped by kids," expressing affection and thanking him. Officer Yanco was also well known in the community as a first-rate youth soccer coach and was popular with his team and team parents.[2]

2. The Crucible Period

- A -

On May 28, 1992, during a follow-up home visit, the mother of a troubled youth counseled by Officer Yanco accused him of engaging in sexually inappropriate behavior with her ten-year old son. Officer Yanco immediately reported this allegation to his superior, Lieutenant Donald Whalen. On June 1, 1992, the Wellesley Police Chief learned of the allegation.

Following this allegation, a series of investigations were undertaken. Investigations were conducted by the Internal Affairs Office of the Wellesley Police, which concluded that Officer Yanco did not engage in any misconduct with respect

to the allegation of May 28, 1992; by the Department of Social Services (DSS), which found no evidence of abuse and declined to pursue the allegation further; by the District Attorney's (DA) Office of Norfolk County, Massachusetts, which determined that no crime occurred and referred the matter back to the Wellesley Police Department.

The May 28, 1992 allegation and subsequent investigations also captured the attention of the local Board of Selectmen, which requested a full report. The May 28, 1992 allegation and subsequent investigations also garnered significant media attention. The record shows, and while not set forth by the Hearing Officer, it appears to be undisputed, that Officer Yanco was aware before June 22, 1992, of the actions of the D.A.'s office and the DSS office discussed above. The last investigation by the Internal Affairs Office was concluded after Officer Yanco's death on June 22, 1992, and resulted in his being cleared finally of any and all charges. It is stipulated by the parties that Officer Yanco did not engage in any misconduct relative to the allegation of May 28, 1992.[3]

- B -

Following the May 28, 1992 allegation, Officer Yanco appeared acutely distressed and could not work the remainder of that day and, accordingly, was sent home by his superior. Both his superior, Lieutenant Whalen, and his wife, plaintiff herein, agreed that "the allegation hit him like a sledgehammer," striking at the core of his person as a trusted youth officer. Thereafter, he was uncharacteristically agitated, irritable, and withdrawn, leaving work early, avoiding phone calls and social situations, and snapping at this two sons and the children on his soccer team.

During the 25-day period following the May 28, 1992 allegation, Officer Yanco suffered pervasive mood disturbances that resulted in crying spells, loss of sleep, appetite and the capacity for enjoyment. Indeed, family,

friends, and colleagues described him during this period as "detached," "far away," and utterly unaware of events going on around him. During this period, Officer Yanco did manifest two short occasions of lucidity, namely arranging the funeral of a young fellow police officer who had died in the line of duty and submitting a voucher for a police convention weeks away. While he grieved normally over the police officer's death, he did not express any guilt over the officer's death nor did he seem obsessed over his death. He felt proud of his work in organizing the memorial service for his fellow officer. Other than these occasions, Officer Yanco became increasingly isolated and irrational.

The accusation of sexual misconduct with a minor was a traumatic and devastating blow for Officer Yanco. From the time of the allegation and the 25-day period thereafter, he felt that his career was hopelessly ruined. This hopeless feeling dominated his existence. Unlike the fighting spirit he displayed in his battle with cancer, he saw no way out of this situation. He was convinced that "everyone knew" of the matter, that no one would believe him, and that the community would never trust him again. He rejected the support of his wife and colleagues and attempted to avoid all children, even his own sons.

Discussions with his wife centered on the allegation of child abuse. He constantly reviewed the allegation and the events of May 28th. His wife urged him to seek professional help but, feeling too ashamed, he refused. Further, Officer Yanco continually anticipated media attention, and each bit of news on the matter affirmed in his mind the fact that his life and career were destroyed. More importantly, he saw no solutions. To him, his future appeared darker and darker and his options fewer and fewer. The allegation, for him, was a single-track thought process, and he manifested a complete inability to reasonably and rationally connect with others as June 22nd dawned.

While not set forth by the Hearing Officer in his Findings of Fact, it is undisputed that Officer Yanco reported for work on June 22, 1992. Officer Yanco attended graduation ceremonies for the D.A.R.E. program and thereafter had a conversation with his supervisor who suggested he take the rest of the afternoon off and return to New Hampshire to vacation with his family. Before departing the police station, Officer Yanco left two letters on the police station computer but they were not printed out. The letters were addressed to his wife and his older son. The letter to his wife was written at 12:35 p.m. While the letters did not mention suicide, a reasonable reading of these letters suggests that Officer Yanco was seriously considering taking his own life. Before leaving the police station, Officer Yanco also submitted a voucher for funds relative to his attendance two months later at a police-oriented convention.

On or about 2:00 p.m. on June 22, 1992, Officer Yanco called the Wellesley Police Department from his home. The call was recorded on tape. He talked to Lieutenant Whalen (his superior) and another officer who tried to reason with him but failed to "reach him." There is a specific moment on the tape when it is evident that Lieutenant Whalen "loses" Officer Yanco. At that moment, Officer Yanco stops responding and sobbing and begins to pray. Lieutenant Whalen says "[at that moment] a chill went over me . . . we lost him . . . he was no longer rational." It is undisputed that Wellesley police officers dispatched to his home as a result of his phone call failed to arrive in time to prevent his death. There is no dispute about the fact that on June 22, 1992, at approximately 2:30 p.m., Officer Yanco died from a self-inflicted gunshot wound while at his home.

- C -

Officer Yanco had no history of job-related stress prior to the allegation. He had no history of mental disease and no history of suicide attempts. He had no medical problems; the

cancer he battled earlier did not recur. Plaintiff, Pamela Yanco, describes her marriage as a happy and healthy one, with no serious conflicts. The Yanco's had no financial problems.[4]

3. Subsequent Administrative Proceedings

- A -

Plaintiff, as the widow of Officer Yanco, applied to the Town of Wellesley Retirement Board for pension benefits based upon Officer Yanco's death occurring in the line of duty. Such benefits were available under Section 9 of Chapter 32 of the Massachusetts General laws. A psychologist and a psychiatrist submitted reports in support of plaintiff's claim for pension benefits. The psychologist found that Officer Yanco was innocent of any sexual misconduct, but that Officer Yanco genuinely believed that his reputation could never recover from the allegation of May 28, 1992, and so ended his life because of that allegation, which arose while in the conduct of his duties as a police officer for the Town of Wellesley. In substance, the psychologist concluded Officer Yanco's suicide was causally related to his work as a police officer and thus occurred in the line of duty. The psychiatrist believed Officer Yanco suffered from an untreated mental disease. On or about August 26, 1993, the Retirement Board held that Officer Yanco died in the line of duty and awarded pension benefits to plaintiff. On September 20, 1993, the Massachusetts Division of Public Retirement Administration completed a state level review of the Town Retirement Board decision and affirmed this decision, thus finalizing plaintiff's pension claim.

- B -

On June 9, 1993, plaintiff filed a Claim For Death Benefits with the Public Safety Officers' Benefit Act Office (PSOBO), a division of the Bureau, on her own behalf, as a

surviving spouse, and on behalf of her surviving two children. The claim for benefits was made pursuant to *42 U.S.C. § 3796* ". . . as a result of the death of [William Yanco] . . . who sustained fatal injury in the line of duty. . . ."[5]

On October 26, 1993, plaintiff's claim was denied by the Director of the Public Safety Officers' Benefits Program, Department of Justice. The basis for this denial was set forth in a Claim Determination, prepared by a Claims Officer on July 27, 1993, with the Concurrences of the Office of General Counsel on October 14, 1993, and the Director on October 18, 1993.

- C -

On November 23, 1993, plaintiff noted an appeal of the denial of death benefits to the PSOB Office. On December 14, 1994, plaintiff filed a formal eight-page written submission in support of her appeal to the Acting Director of the PSOB Program.

A Hearing Officer was authorized by the Bureau to conduct a hearing on plaintiff's appeal, and a hearing was held on November 9, 1995. Bureau Regulations (*28 C.F.R. § 32.24*) require the Hearing Officer to "conduct the hearing in such manner as to best ascertain the rights of the claimant." On December 6, 1995, the Hearing Officer rendered his "Determination On Appeal." The Hearing Officer determined that Officer Yanco's suicide was the result of a traumatic injury sustained in the line of duty and was an unintentional act within the purview of the PSOB Act entitling plaintiff and her children to receive benefits under the Act. In reaching his determination, the Hearing Officer noted that he:

> . . . relied principally on the report and testimony of Laurie Raymond, M.D., a widely regarded expert on job related Post Traumatic

> Stress Disorder, the report and testimony of Dr. James Beck, M.D., Ph.D., a forensic psychiatrist currently serving as Director of the Cambridge Court Clinic, Cambridge, Massachusetts, Chief of Forensic Psychiatry at Cambridge Hospital and Associate Professor of Psychiatry at Harvard Medical School, and the report of Ronald Ebert, Ph.D., Senior Forensic Psychologist At McLean Hospital, Belmont, Massachusetts. Dr. Ebert testified before the House Armed Forces Committee concerning the USS IOWA incident. I also relied on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, the report of Chief of Police Thomas O'Loughlin, the testimony of Sergeant Robert Meaney, the observations of Lieutenant Donald Whalen and Pamela Yanco and the tape of the last eighteen minutes of Officer William Yanco's life.

Based on the medical evidence before him, the Hearing Officer found that from the time of the false allegation on May 28, 1992, until the time of his death on June 22, 1992, Officer Yanco suffered from Post Traumatic Stress Disorder (PTSD) and Major Depression (depression) (H.O. Finding No. 15.) He also found that the accusation of sexual misconduct with a minor was a traumatic, devastating event for Officer Yanco; that the allegation was "an event outside the usual range of human experience that would be markedly distressing to almost anyone" and presented a serious threat to his emotional integrity and professional standing. Officer Yanco persistently reexperienced the allegation and exhibited the vast majority of symptoms associated with PTSD and depression the Hearing Officer described in his Findings of Fact Nos. 17-26. The Hearing Officer also referenced the

American Psychiatric Association's Diagnostic and Statistical Manual of Medical Disorders IV (1994) (DSM-IV and/or DSM-III-R (1987)) (H.O. Finding No. 16).

The Hearing Officer found that, over his last 26 days, Officer Yanco suffered progressive "ego constriction," meaning he lost the ability to cognitively connect with others and understand events going on outside of the allegation of sexual misconduct and the ensuing investigations and news coverage. He was, the Hearing Officer found, eventually unable to distinguish right from wrong. The Hearing Officer found that Officer Yanco's ego constriction was evidenced by the notes he wrote to his family on June 22, which made it apparent that he was unable to say goodbye in a meaningful way, leaving the notes unfinished on a computer screen and leaving no note to his younger son. The Hearing Officer also found that the testimony of Lieutenant Whalen relative to his telephone conversation with Officer Yanco shortly before his death was such that he felt that Officer Yanco was no longer rational and that efforts to reach him were lost. (H.O. Finding Nos. 22, 25, 26).

The Hearing Officer also found that the allegation of misconduct alone led to Officer Yanco's mental injuries. (H.O. Finding 39).

- D -

Under Bureau Regulations (*28 C.F.R. § 32.24*(g and h)), "the hearing officer's determination shall be the final agency decision except when it is reviewed by the Director . . . ." The Director may, on his or her own motion, review a determination made by a hearing officer. The regulations prescribe the procedures to be followed if the Director decides to review a hearing officer's determination. (*28 C.F.R. § 32.24(i)*).

In a memorandum dated June 17, 1996, from the Chief, PSOB Program, to the Director of the Bureau, recommending

appeal of the Hearing Officer's determination, it was stated, in pertinent part:

> The Office of General Counsel advises that, if you accept this appeal from the program office, you have the right to obtain additional information. This could include psychological autopsies conducted by experts not previously associated with this case.

By letter dated August 23, 1996, the Director notified plaintiff's attorney that she had accepted the appeal by the PSOB Program Office in the case of William Yanco. This letter stated in pertinent part:

> Pursuant to the PSOB implementing regulations (28 CFR 32), you would normally have 30 days from receipt of this letter to submit additional information to the BJA Director to inform her review and determination. In this case, however, Director Gist may exercise her right to obtain additional information and evidence in the form of psychological autopsies. Should this occur, you will be provided with copies of the psychological autopsies, and then given 30 days to respond to them and submit whatever additional information or evidence you choose.

On September 21, 1996, plaintiff's attorney submitted her response in connection with the Director's review.

By letter dated February 20, 1997, plaintiff was notified that the Director of the Bureau of Justice Assistance had reversed the determination of the Hearing Officer. The Director's Decision stated, in pertinent part, as follows:

It is my determination that the hearing officer's determination is not consistent with the PSOB Act *(42 U.S.C. 3796)* and its implementing regulations, and accordingly, the above referenced claim can not be approved. Findings of Fact 1 through 5, 9 through 14, and 27 are accepted from the hearing officer's determination memorandum. The following Conclusions of Law are substituted for the hearing officer's determination:

Conclusions of Law

1. In order to qualify for benefits under the PSOB Act, it must be demonstrated that a public safety officer's death resulted from a personal injury sustained in the line of duty. Section 32.2 (3) [sic (e)] of the PSOB implementing regulations defines "personal injury" as a traumatic injury, or diseases which are caused by or result from such an injury, but not occupational diseases.. Traumatic injury is further defined in Section 32.2 (g) of the regulations as ". . . a wound or condition of the body caused by external force, including injuries inflicted by bullets, explosives . . . **but excluding stress and strain**." [emphasis added]

2. Since stress is not encompassed by traumatic injury as defined in the regulations, then Officer Yanco's "injury" is not encompassed within the definition of "personal injury," and is therefore not cognizable under the PSOB Act.

3. The hearing officer's conclusion that a traumatic injury includes mental or psychological injuries is totally unfounded and without merit.

4. If Officer Yanco's self-inflicted gunshot wound is viewed as the traumatic injury, benefits still can not be paid because the injury must be sustained in the line of duty. Section 32.2 (c)(1) defines line of duty as any action which an officer is obligated or authorized by rule, regulations, condition of employment or service, or law to perform. Clearly, Officer Yanco was not acting within the line of duty at the time of his death.

5. Section 1202 (1) of the PSOB Act specifically precludes the award of benefits if the officer's death was caused by such officer's

> intention to bring about his or her own death. The record shows that Officer Yanco logically explained his reasons for despair, his fear that his reputation was irreparably ruined, and his feeling that he could not take the pressure of the possible criminal investigation and the resulting disgrace. Officer Yanco prepared notes for his wife and son, explaining the reasons for his action, approximately two hours before his suicide. Finally, Officer Yanco then called a close associate to inform him of his plans, and where to find the notes that were left. In my view, these actions indicate a carefully thought out and methodically carried through act of suicide. I find the factual record insufficient to support the hearing officer's finding that Officer Yanco was incapable of forming the intention to take his own life. Claimant has not satisfied her burden of proof on this issue.

(emphasis in original).

Plaintiff's complaint was filed in this court on June 16, 1998.

Discussion

- A -

The PSOBA provides, upon the Bureau's determination of eligibility, for the payment of a death benefit of $ 100,000 to the surviving spouse and children of a public service officer who has died "as the direct and proximate result of a personal injury sustained in the line of duty. . . ." *42 U.S.C. § 3796.* The Bureau was "authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes" of the Act. *42 U.S.C. § 3796.* The Bureau accordingly promulgated appropriate regulations. *28 C.F.R. § 32.1 et seq.* (7/1/98 Ed.).

In *Chevron U.S.A. v. National Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778, reh'g denied, 468 U.S. 1227, 82 L. Ed. 2d 921, 105 S. Ct. 28, 105 S. Ct. 29 (1984),* the Supreme Court established the standard ("*Chevron* deference") for federal courts to use when reviewing agency action based on the agency's own promulgated regulations. The *Chevron* analysis consists of two steps. The first step is to determine whether Congress has spoken directly to the precise question in issue. If Congress has not so spoken, the court then proceeds to the second step of the analysis to determine whether the regulations interpreting the PSOBA are based on a permissible construction of the PSOBA.

If Congress has spoken directly to the precise question in issue, the Bureau, as well as the court, must give effect to the unambiguously expressed intent of Congress. *Chevron, 467 U.S. at 842-43; see also Chacon v. United States, 48 F.3d 508, 511-12 (Fed. Cir. 1995).* However, if Congress has not expressly addressed the issue before the court, *i.e.*, "[If] the statute is silent or ambiguous on a point, 'considerable weight' and 'substantial deference' must be accorded the interpretation of a statute by the agency that is responsible for its implementation." *Rosete v. OPM, 48 F.3d 514, 517 (Fed.*

Cir. 1995) (citing *Rust v. Sullivan, 500 U.S. 173, 184, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)).* Moreover, under such circumstances, a court may not substitute its own construction of a statutory provision or reject a reasonable interpretation made by the Bureau Director. Indeed, the court must affirm any reasonable interpretation made by the agency Director, unless it appears from the statute or its legislative history that the agency's interpretation is not one that Congress would have sanctioned. *Chevron, 467 U.S. at 842-45.* Under the *Chevron* framework, discussed above, the court must, when appropriate, give Bureau regulations *Chevron* deference. *Chevron* deference is also due when the Bureau's interpretation of its regulations is reasonable. *See United States v. Haggar Apparel Co., 526 U.S. 380, 119 S. Ct. 1392, 1394-95, 1399-1400, 143 L. Ed. 2d 480 (1999).*[6]

The court's review of the Bureau's denial of death benefits in this case is limited to three inquiries: (1) whether there has been substantial compliance with the PSOBA and implementing regulations; (2) whether there has been arbitrary or capricious action on the part of the Bureau officials; and (3) whether there was substantial evidence supporting the Bureau's determination, *Chacon, 48 F.3d at 511.* With respect to inquiry (1), plaintiff contends the Bureau misconstrued the language of the PSOBA and implementing regulations. Such an inquiry is clearly legal in nature. With respect to inquiry (2), plaintiff charges that the Bureau arbitrarily and capriciously ignored the uncontroverted and consistent opinion of three qualified experts in reversing the Hearing Officer's determination favorable to plaintiff. Consideration of inquiry (2) is mandated only if plaintiff receives a favorable determination on inquiry (1). While there does not appear to be any substantial evidence dispute regarding inquiry (3), no consideration of this matter is mandated in any event if plaintiff's contentions relative to inquiry (1) are rejected.

- B -

The operative facts are not in dispute. On May 28, 1992, while in a duty status, Officer Yanco visited the home of a troubled youth. Such a visit was in the line of duty. During this visit, Officer Yanco was accused by the mother of the youth of sexual impropriety with her son. As a result of this allegation, Officer Yanco suffered subsequent mental problems[7] which, by way of psychological autopsies, were diagnosed as Post Traumatic Stress Disorder (PTSD) and Major Depression. Twenty-five days after the allegation was made, on June 22, 1992, Officer Yanco killed himself with his service revolver while at home and off duty.

Plaintiff contends that the May 28, 1992 allegation resulted in a mental and psychological personal injury which Officer Yanco incurred while in the line of duty and which was causally related to his death, entitling her and her children to death benefits under the PSOBA.[8]

The Bureau rejected this contention and stated, in pertinent part, as follows:

> **Conclusions of Law**
>
> 1. In order to qualify for benefits under the PSOB Act, it must be demonstrated that a public safety officer's death resulted from a personal injury sustained in the line of duty. Section 32.2 (3) [sic (e)] of the PSOBA implementing regulations defines "personal injury" as a traumatic injury, or diseases which are caused by or result from such an injury, but not occupational diseases.. Traumatic injury is further defined in Section 32.2 (g) of the regulations as ". . . a wound or condition of the body caused by external force, including injuries inflicted by bullets,

> explosives . . . **but excluding stress and strain**." [emphasis added]
>
> 2. Since stress is not encompassed by traumatic injury as defined in the regulations, then Officer Yanco's "injury" is not encompassed within the definition of "personal injury," and is therefore not cognizable under the PSOBA Act.
>
> 3. The hearing officer's conclusion that a traumatic injury includes mental or psychological injuries is totally unfounded and without merit.

The critical language of the PSOBA states "that a public safety officer [who] has died as the direct and proximate result of a personal injury sustained in the line of duty" shall be eligible for the benefit provided by the Act (emphasis supplied). *42 U.S.C. § 3796.* Congress did not define "personal injury" in the Act, nor was "personal injury" defined or explained in the legislative history of the Act relative to the particular issue now before the court. While the parties cite to various portions of the legislative history in an effort to prop up their contentions that the legislative history supports their views, the best that can be said of the legislative history of the Act on the matter at issue is that it is ambiguous. Under these circumstances, the *Chevron* deference standard discussed above comes into play. *Chacon, 48 F.3d at 512.* In the first step analysis, it is determined Congress was silent on the issue of whether a mental and psychological injury is embodied in the PSOBA's "personal injury" language.

The final questions that must now be answered are whether the Bureau's interpretation of the PSOBA and its implementing regulations was a permissible construction of the Act and was otherwise reasonable.

The Bureau, in its regulations, defined "personal injury" as a "traumatic injury," and further defined "traumatic injury" "as . . . a wound or condition of the body caused by external force, including injuries inflicted by bullets, explosives . . . but excluding stress and strain" (emphasis supplied). The Bureau concluded that the "injury" asserted by plaintiff as the basis for her claim was specifically excluded from the definition of a "traumatic injury." In the second step analysis, the court concludes that the Bureau's interpretation was based on a permissible construction of the PSOBA. *Chevron, 467 U.S. at 842-43.*

Plaintiff maintains that the self-inflicted gunshot wound that resulted in Officer Yanco's death is not the injury that forms the basis for her claim in this case. Instead, plaintiff asserts, the injury that serves as the basis for her claim is the false accusation by a "minor male of conduct amounting to pedophilia." In other words, plaintiff contends that the allegation of sexual impropriety was a "traumatic injury" within the purview of the Act and implementing regulations. The Bureau rejected plaintiff's contention that a traumatic injury includes mental and psychological injuries which resulted from the false allegation.[9]

Plaintiff has the burden of showing a traumatic injury for entitlement to survivor benefits under the PSOBA. *Greeley v. United States, 50 F.3d 1009, 1011 (Fed. Cir. 1995).* Plaintiff first maintains that the Bureau's determination is inconsistent with its own regulations, citing *28 C.F.R. § 32.8.* Section 32.8 deals with an officer's "Intention to bring about [his] death or permanent and total disability." This section has nothing to do with the initial determination of whether or not the officer is eligible to receive benefits under the Act. Before the question of intention can be addressed, the question of eligibility for the benefit must be determined (emphasis added). Plaintiff's effort to create an inconsistency in this regard lacks merit.

Plaintiff seemingly recognizes this for her main argument is that "the issue of whether or not the term 'injury' under the PSOBA encompasses mental injuries can be resolved by looking to worker's compensation cases." (Pltf's Motion Br. p. 19). Plaintiff, in support of this position, relies heavily on *Russell v. Law Enforcement Assistance Administration, 637 F.2d 1255 (9th Cir. 1980),* wherein the Ninth Circuit concluded that "courts should look to general [state] workers' compensation law as a guide to the development of a federal law and interpret the Benefits Act job-relatedness test consistently with workers' compensation doctrines, unless there is a significant policy reason to diverge." *(637 F.2d at 1265).* First, there is tension created between the court's holding in *Russell*, decided in 1980, and the Supreme Court's establishment of the *Chevron* deference analysis in 1984 in *Chevron, 467 U.S. at 842-45,* later emphatically reaffirmed in 1999 in *Haggar Apparel Company, 119 S. Ct. at 1394-95, 1399-1400.*[10] More importantly, the Federal Circuit in *Chacon, 48 F.3d at 511-12,* specifically held that the *Chevron* deference analysis was the proper approach when considering a party's challenge to the Bureau's interpretation of the PSOBA since it has been charged with administering the Act. Moreover, a later Ninth Circuit opinion, *Davis v. United States, 169 F.3d 1196, 1200 (9th Cir. 1999),* found the Ninth Circuit lacked jurisdiction to review Bureau decisions under the PSOBA after concluding that the *Russell* court's determination that it had jurisdiction had been undermined and that "*Russell* no longer controls." While this court, in any event, would not be bound by the rationale set forth in *Russell*, the fact that the *Russell* court was later found to lack jurisdiction to rule on the matter before it certainly detracts from any precedential value the decision might otherwise have. Finally, prior decisions of the court have cautioned that there are distinctions between the PSOBA and the differing workmen's compensation statutes in the multiplicity of states. *See North, 1 Cl. Ct. at 98, 555 F. Supp. at 387; Tafoya v. United States, 8 Cl. Ct. 256, 263 (1985);*[11]

but see *Harold v. United States, 225 Ct. Cl. 168, 634 F.2d 547, 552 (Fed. Cir. 1980),* wherein the Court of Claims concluded Congress did not intend to debar benefits to public safety officers' survivors when the officer's death was caused by his own gross negligence. The *Harold* court referred to "a well accepted principle of the law of workmen's compensation" regarding line of duty determinations. Whether the *Harold* holding would survive a *Chevron* analysis today is questionable. *See Haggar, 119 S. Ct. at 1400,* wherein *Chevron* deference trumped the historical practice in custom cases. In any event, the *Harold* reasoning does not dictate a different result in this case because Congressional intent is not "thwarted" by the holding in this case. Accordingly, reliance on workmen's compensation case law generally does not seem to be, at this date, a viable tool in determining eligibility for PSOBA benefits.

Plaintiff also takes issue with the Bureau's inclusion of mental and psychological injuries within the "stress and strain" exclusionary language of the regulations. *28 C.F.R. § 32.2(g).* In *Smykowski, 647 F.2d at 1105,* the court noted, and it is true in the case at bar, that "Claimants do not take issue with the agency's position excluding stress, strain, and heart disorders from coverage of the Act, exclusions which, in any event, are amply justified by the statutory language, legislative history [fn 6], and medical statistics [fn 7]" (footnotes 6 and 7 omitted). Plaintiff argues that Post Traumatic Stress Disorder (PTSD) and depression is "a singular, isolated, identifiable and extreme event" and is to be distinguished from the common stress and strain inherent in everyday police work.[12] Whatever appeal this argument has runs counter to the *Chevron* deference rule, discussed above relative to the Bureau's interpretation of its own regulations. Further, it seems reasonable to categorize the allegation which set in motion the stress and strain in Officer Yanco as a trying event, or an "extreme event" as plaintiff categorizes it, and not a traumatic injury. *See Smykowski, 647 F.2d at*

1105. Traumatic events, such as the allegation of sexual impropriety, are to be distinguished from traumatic injuries. Traumatic events do not themselves constitute traumatic injuries. "Heart attacks generally do not constitute traumatic injuries, so deaths from heart attacks do not qualify for Benefits Act benefits . . . ." *Russell v. United States, 231 Ct. Cl. 1022, 1023 (1982).*

Plaintiff has the burden of showing that the Bureau's inclusion of PTSD and depression as encompassed by the exclusionary language "stress and strain" is unreasonable under the existing circumstances. Plaintiff has not carried her burden in this regard. It must be remembered that "The court need not conclude that the agency construction was the only one it permissibly could have adopted" in order for the court to accept it. *Chevron, 467 U.S. at 843, n.11; Chacon, 48 F.3d at 512.* The court "must affirm any reasonable interpretation made by administrators of [the] agency." *Chevron, 467 U.S. at 844; Chacon, 48 F.3d at 512.* Finally, the court is not persuaded that the exercise of judicial deference in this case will "thwart congressional intent." *See Haggar Apparel Company, 119 S. Ct. at 1400.*

As further support for her position that post-traumatic stress disorder should be included in the definition of "personal injury" under the PSOBA, and the Bureau's failure to do so was, according to plaintiff, unreasonable, plaintiff calls the court's attention to *38 C.F.R. § 3.304(f)*, regulations issued by the Veterans Administration relative to pensions, bonuses, and veterans' relief. Section 3.304(f) specifically provides that post-traumatic stress disorder can serve as a basis for a pension award in determining veterans' benefits. The PSOBA, its legislative history, and implementing regulations make no reference to post-traumatic stress disorder. Plaintiff also refers to *38 U.S.C. § 1110* generally, which provides compensation to veterans for service-connected disability and death, especially the determination of benefits in suicide cases. As noted earlier, the PSOBA

must be interpreted on the basis of its specific language and the specific language of its implementing regulation. *See North, 1 Cl. Ct. at 98, 555 F. Supp. at 387.* Plaintiff's argument, in this respect, would be best addressed to Congress rather than to the court. This was the admonition the Court of Claims gave the claimant in *Smykowski, 647 F.2d at 1106,* and it is equally appropriate in this case. *See also Russell, 231 Ct. Cl. at 1025.*

The court concludes that the Bureau has substantially complied with the PSOBA and implementing regulations and that it has not in any significant way misconstrued the Act or the implementing regulations. The Bureau's determination in this case has not been shown to be unreasonable or inconsistent with Congressional intent.

- C -

Plaintiff alleges the Bureau committed procedural error in the processing of her claim. Plaintiff argues there was excessive delay between the date of the Hearing Officer's determination on December 6, 1995, and the final Bureau decision on February 14, 1997. Plaintiff first claims the procedural requirements of *28 C.F.R. § 32.24(i)*2 were violated. This provision relates to a situation where a claimant is determined to be ineligible for benefits by the Hearing Officer. In the case at bar, the Hearing Officer found plaintiff eligible for benefits. Accordingly, this provision is not applicable in this case. Plaintiff next claims the procedural requirements of 28 C.F.R. § 32, Appendix to Part 32, subsection (e)3, were violated. This section has applicability to this case in that it covers the situation where ". . . either the PSOB Office or the OGC [Office of General Counsel] disagrees with the Hearing Officer's final determination." Subsection 3 provides, in pertinent part, ". . . The BJA Director shall seek to advise all parties of the final agency decision within 30 days after expiration of the comment period." A plain reading of this subsection does not

mandate a 30-day period within which the Bureau must issue a decision. Plaintiff submitted her comments on September 21, 1996. The Bureau's decision was dated February 14, 1997, some 116 days (from October 21, 1996) later. There was no violation of this discretionary implicated procedural time frame. In any event, plaintiff was not harmed procedurally or otherwise as far as her claim was concerned. Plaintiff does not specifically deny this fact. Most importantly, plaintiff's counsel was given a fair opportunity to present her claim to the Bureau. Instead, plaintiff's claim of harm is counsel's assertion that the delay in not processing plaintiff's claim more expeditiously extended the Yanco family's "torture and emotional pain and suffering of the absence of closure on Officer Yanco's death" and "The torture of the extended delay has made it impossible for the Yanco family to put closure on the grief process and has had a measurable adverse impact on Mrs. Yanco's health."[13] There is no factual support for these assertions. More importantly, such assertions are not the kind of harm that supports assessment of any penalty, assuming there was a significant violation of a procedurally-mandated time requirement. Generally, assertions such as these by counsel at oral argument or in the briefs deserve little, if any, consideration. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626-27 (Fed. Cir. 1984); Singleton v. United States, 6 Cl. Ct. 156, 168 (1984).*

- D -

Having concluded that plaintiff was not eligible for benefits under the PSOBA (Inquiry (1), Part - A - of Discussion), it is really not necessary to decide two other issues (Inquiries (2) and (3), Part - A - of Discussion) which the Bureau discussed and to which the parties directed a good portion of their briefs and arguments. However, a brief discussion of those two issues might be helpful in confining the various assertions and arguments of counsel to the appropriate inquiry.

In its fourth "Conclusion of Law," the Bureau concluded that Officer Yanco was not acting in the line of duty at the time of his death. This conclusion was based on the view that Officer Yanco's self-inflicted gunshot wound was the traumatic injury that caused his death. The self-inflicted gunshot wound took place at Officer Yanco's home when he was off duty. The Bureau referenced section 32.2(c)(1) of the regulations which defined Line of Duty as "Any action which an [officer] is obligated or authorized by rule, regulation, condition of employment or service, or law to perform." Officer Yanco was not obligated or authorized to shoot himself.[14] Plaintiff maintains that the self-inflicted gunshot wound was not the traumatic injury suffered in the line of duty in this case. Plaintiff insists that the false allegation by a minor male of conduct amounting to pedophilia was the traumatic injury in this case and this allegation was made when Officer Yanco was on duty. As indicated earlier, the allegation itself generally would not be sufficient to kill an officer. *See North, 555 F. Supp. at 386.* Too, Officer Yanco's refusal to seek professional help relative to his stress and depression, as urged by his wife, because he felt ashamed might be deemed a critical intervening factor that could have possibly averted the tragedy. The court need not and does not decide this issue.

In the fifth "Conclusion of Law," the Bureau concluded that Officer Yanco intended to kill himself. In this regard, the Bureau held that the Act precluded the award of benefits if the officer's death was caused "by such officer's intention to bring about his death. . . ." In support of this conclusion, the Bureau stated in pertinent part:

> . . . The record shows that Officer Yanco logically explained his reasons for despair, his fear that his reputation was irreparably ruined, and his feeling that he could not take the pressure of the possible criminal investigation

> and the resulting disgrace. Officer Yanco prepared notes for his wife and son, explaining the reasons for his action, approximately two hours before his suicide. Finally, Officer Yanco then called a close associate to inform him of his plans, and where to find the notes that were left. In my view, these actions indicate a carefully thought out and methodically carried through act of suicide. I find the factual record insufficient to support the hearing officer's finding that Officer Yanco was incapable of forming the intention to take his own life. Claimant has not satisfied her burden of proof on this issue.

While plaintiff argues there was no substantial evidence in support of the Bureau's discussion of Officer Yanco's "intention," the factual matters recited by the Bureau in the above conclusion constitute, standing alone, significant evidence on the matter of intention.[15] Plaintiff's real argument on this issue is that the Bureau failed to give due consideration to the opinions of two certified psychiatrists and a forensic psychologist who conducted posthumous psychiatric evaluations (psychological autopsies) and whose conclusions caused the Hearing Officer to rule in plaintiff's favor.[16]

Plaintiff argues that the Bureau's refusal to accept the Hearing Officer's award of benefits which rested squarely on the reports and/or testimony of the above three experts was arbitrary and capricious.[17] Indeed, that refusal, plaintiff stresses, is compounded by the Bureau's total disregard of such evidence. Since the Bureau had concluded that plaintiff was not eligible for benefits under the PSOBA, it really was not necessary for the Bureau to "gild the lilly" by advancing another basis for denial of the claim, especially if the basis

for the decision was an incomplete consideration of the totality of the record evidence.

As to the merits of plaintiff's charge of arbitrary and capricious disregard of expert opinions on the matter, "Even uncontradicted opinion testimony is not conclusive if it is intrinsically nonpersuasive. . . ." *Sternberger v. United States, 185 Ct. Cl. 528, 401 F.2d 1012, 1016 (Ct. Cl. 1968).* However, "'The substantiality of evidence must fairly take into account whatever in the record detracts from its weight.' *Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456* . . . (1951). . . ." *Id., 401 F.2d at 1016.* While the Bureau has the right to reject or disregard the uncontroverted opinions of experts, it may also have an obligation to provide a reasoned explanation why it rejects or disregards such opinions. *See McClendon v. Secretary of Department of Health and Human Services, 23 Cl. Ct. 191, 199 (1991).* To the extent the Director of the Bureau detected faults, omissions, or other errors, which generated disbelief or unpersuasiveness in the experts' opinions, she would have been better served to have voiced them in her fifth conclusion of law. *See Sternberger, 401 F.2d at 1016-17.* [18]

In any event, given the holding above that plaintiff was not eligible for PSOBA benefits, the court need not and does not rule on plaintiff's contention of arbitrary and capricious action on the part of the Bureau in the decision-making process in this case.

Conclusion

For reasons set forth above, the court concludes that plaintiff, and her children, are not eligible for PSOBA benefits. Accordingly, defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied. The complaint shall be dismissed. No costs.

IT IS SO ORDERED.

Footnotes

[1] Defendant has also moved to dismiss the complaint for failure to state a claim under Rule 12(b)(4). In the context of this case, summary disposition of the case under Rule 56 is deemed more appropriate than disposition under Rule 12(b)(4). Motions for judgment on the administrative record are generally treated in accordance with the rules governing motions for summary judgment. *See* RCFC 56.1.

[2] Most of the facts in this section were taken from the "Findings Of Fact" of the Administrative Hearing Officer. They were supported by the record before him. On appeal, the Bureau Director accepted the Hearing Officer's findings (Nos. 1-5) set forth in the first three paragraphs above but rejected his findings (Nos. 6-8) set out in the fourth paragraph above, without explanation, since, ostensibly, they were immaterial to the Director's determination that Officer Yanco's widow and children were not eligible for death benefits.

[3] The facts in this section were taken from the "Findings of Fact" (Nos. 9-14) of the Administrative Hearing Officer. They were supported by the record before him. On appeal, the Bureau Director accepted those facts set forth by the Hearing Officer.

[4] The facts in the first four paragraphs and the sixth and seventh paragraphs, set forth above in this section, were taken from the "Findings of Fact" (Nos. 16-21, 23-26) of the Administrative Hearing Officer. They are supported by the record before him. On appeal, the Bureau Director rejected these facts without explanation. See note 2. However, the Bureau Director does refer to the telephone call discussed in paragraph six and the notes discussed in paragraph seven above in her Decision at paragraph 5, set out *infra* in the text.

[5] The claim process is described in *Smykowski v. United States, 227 Ct. Cl. 284, 647 F.2d 1103, 1105 n.4 (Ct. Cl. 1981).*

[6] In *United States v. Haggar Apparel Co.*, the Supreme Court stated in pertinent part:

> For purposes of the *Chevron* analysis, the statute is ambiguous nonetheless, ambiguous in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms. Those specifics are instructive to the agency as to the general congressional purpose, and the agency's rules as to instances not covered by the statute shall be parallel, to the extent possible, with the specific cases Congress did address.

119 S. Ct. at 1400.

[7] Officer Yanco became severely depressed as he was convinced his reputation had been irreparably ruined and felt unable to handle the pressures of the investigations and the perceived resulting disgrace. Three different investigations of this allegation cleared Officer Yanco of any wrongdoing. Indeed, the results of two of the three investigations were made known to Officer Yanco before June 22, 1992, the day of his death.

[8] In her submission, plaintiff states, "The gunshot wound was not the injury suffered in the line of duty in this case." The injury, plaintiff asserts, was the false accusation by a "minor male of conduct amounting to pedophilia."

[9] It seems obvious that the allegation itself would not be sufficient to kill an officer. *See North v. United States, 1 Cl. Ct. 93, 97, 555 F. Supp. 382, 386 (1982); Durco v. United*

States, 14 Cl. Ct. 424, 426-29 (1988). It was Officer Yanco's perception of the allegation and his inability or unwillingness to seek help relative thereto that created the stress, the strain, and the depression within him that led to his death. Had Officer Yanco sought counseling, as urged upon him by his wife, his stress and depression might well have been brought under control (*See* Dr. Beck's testimony, Administrative Record, p. 101). It is an occupational hazard for police officers to encounter allegations of various improprieties in the performance of their duties, *e.g.*, police brutality, unnecessary force, sexual improprieties, discrimination claims, bribery, job performance failures, and civil rights violations. *See* n.12 *infra.*

[10] "The whole point of regulations such as these, however, is to ensure that the statute [here the PSOBA] is applied in a consistent and proper manner. Deference to an agency's expertise in construing a statutory command is not inconsistent with reaching a correct decision." *Haggar Apparel Company, 119 S. Ct. at 1399.* Reliance on the workmen's compensation laws of the 50 states would not ensure that the PSOBA is applied in a consistent and proper manner.

[11] In *Morrow v. United States, 227 Ct. Cl. 290, 647 F.2d 1099, 1101, fn. 2 (1981),* the Court of Claims cited "Commentary" [*42 Fed. Reg. 23260 (1977)],* wherein the Bureau's predecessor LEAA wanted "to ensure that eligibility [for the PSOBA benefits] will be determined by a uniform set of rules, regardless of where in the country the officer died or his beneficiaries reside. LEAA believes that the establishment of uniform rules and precedents best manifests congressional intent. In the Hearing Officer's determination, he notes that the workmen's compensation laws of approximately 30 states compensate for mental injuries. The reasonable conclusion to be drawn from this assertion is that approximately 20 states do not compensate for mental injuries. This observation suggests that reliance on

workmen's compensation cases would not produce uniform rules and precedents.

[12] In *Smykowski, 647 F.2d at 1106,* the Court of Claims cited legislative history which "identified police work as the most hazardous occupation in terms of the probability of developing stress-related problems. Present evidence indicates that more law enforcement officers are incapacitated because of heart-related illness than due to any other cause." This same legislative history citation opined one senator's view "that many deaths [of public service officers] could be avoided if preventive action were taken. By preventive action, I mean assuring that these public safety officers are in good physical and mental condition." *See* n.9, *supra.*

[13] It should be borne in mind that the PSOBA was designed to serve as "a limited program" which would "balance 'compensating for inadequate state and local benefits . . . [with] budgetary considerations and . . . fears that federal assumption of full responsibility for compensating the families of deceased officers would weaken the federal system and allow states and municipalities to evade their responsibility.'" *See Chacon v. United States, 32 Fed. Cl. 684, 687 (1995).* As indicated earlier, plaintiff was granted a pension by the State of Massachusetts and there is no allegation that the pension was inadequate.

[14] In *Harold v. United States, 634 F.2d at 548-49,* an officer's death in cleaning his weapon in a grossly negligent manner at home while off duty was deemed to be in the "line of duty" because "it was an unwritten rule of the police department that the policemen were to clean their weapons at home."

[15] Plaintiff suggests that the Bureau really denied this claim solely because it was a suicide. The record does not support this view. While the Bureau has had to deal with few cases involving suicide, in the only case documented in the

materials before the court (the suicide of a Chief of Police), the benefits claim was denied based on a suicide note and an autopsy report showing that the gun was pressed to the side of decedent's head when the fatal bullet was fired. The Bureau also rejected the view, advanced in that particular case, that pressures which emanated from his job led to his suicide, and thus warranted the payment of benefits. The Police Chief of the Town of Wellesley in his June 1993 Report on Officer Yanco's suicide quoted from a Mental Health Association brochure entitled Grief After Suicide (1981) in pertinent part as follows: "Each suicide is individual, regardless of the generalizations about the 'whys,' and there may be no way you will completely understand the suicide victim's thought process."

[16] Dr. Beck, a psychiatrist and licensed psychologist, concluded in his report that Officer Yanco's "depression was so great that it substantially interfered with his capacity to monitor and control his own suicidal impulses. . . . Officer Yanco lacked the mental capacity to form intent at the time he killed himself." Dr. Raymond, a psychiatrist, concluded in her report that Officer Yanco "had [an] untreated mental disease, i.e., Post-Traumatic Stress Disorder and Major Depression, as well as accompanying 'ego constriction' . . . . He did not appreciate the wrongfulness of his act. He saw no alternative for himself and he wanted to relieve himself of his intense mental anguish over the allegations and potential loss of his reputation. . . ." Dr. Ebert, a forensic psychologist, concluded in his report that Officer Yanco "genuinely believed that his reputation could never recover from the allegation and so ended his life because of an incident that arose while in the conduct of his duties as a police officer for the Town of Wellesley." Plaintiff argued often and strenuously that the Hearing Officer's determination favorable to plaintiff should be accepted by the court. However, it is the determination of the Bureau Director that

counts. *See, e.g., Smykowski, 647 F.2d at 1105, n.4; see also Howard v. United States, 229 Ct. Cl. 507, 508-09 (1981).*

[17] The "arbitrary and capricious" standard, for agency review purposes, is a highly deferential standard. Under that standard, a court is not empowered to substitute its judgment for that of the agency. *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).* Indeed, "the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision." *United States v. Garner, 767 F.2d 104, 116 (5th Cir. 1985).*

[18] At oral argument, defendant's counsel did attempt, in a very limited way, to find fault with the opinions of the experts arguing, for example, that Dr. Beck's testimony was inconsistent with his report on the question of intention. It should also be noted that the reports of Dr. Raymond and Dr. Ebert were initially prepared for and in support of plaintiff's pension claim filed with the Town of Wellesley and the State of Massachusetts. *See Chacon, 32 Fed. Cl. at 687, aff'd, 48 F.3d 508.* In Dr. Raymond's report, she relies on workmen's compensation law in support of her conclusion. Dr. Raymond's report was not directed to the PSOBA. As suggested earlier, reliance on workmen's compensation cases does not seem to be a viable tool in determining eligibility for PSOBA benefits.

42 USCS § 3796

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*** CURRENT THROUGH P.L. 107-36,
APPROVED 8/20/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 46. JUSTICE SYSTEM IMPROVEMENT

PUBLIC SAFETY OFFICERS' DEATH BENEFITS
DEATH BENEFITS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

42 USCS § 3796 (2001)

§ 3796. Payment of death benefits

(a) Amount; recipients. In any case in which the Bureau of Justice Assistance (hereinafter in this part referred to as the "Bureau") determines, under regulations issued pursuant to this part that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $ 100,000, adjusted in accordance with subsection (h), as follows:

(1) if there is no surviving child of such officer, to the surviving spouse of such officer;

(2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;

(3) if there is not surviving spouse, to the child or children of such officer in equal shares; or

(4) if none of the above, to the parent or parents of such officer in equal shares.

(b) Permanent and total disability; payment. In accordance with regulations issued pursuant to this part, in any case in which the Bureau determines that a public safety officer has become permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty, the Bureau shall pay, to the extent that appropriations are provided, the same benefit in any year that is payable under subsection (a) in such year, adjusted in accordance with subsection (h), to such officer: Provided, That the total annual benefits paid under this subsection may not exceed $ 5,000,000. For the purposes of making these benefit payments, there are authorized to be appropriated for each fiscal year such sums as may be necessary: Provided further, That these benefit payments are subject to the availability of appropriations and that each beneficiary's payment shall be reduced by a proportionate share to the extent that sufficient funds are not appropriated.

42 USCS § 3796b

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DEATH BENEFITS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

42 USCS § 3796b (2001)

§ 3796b. Definitions

As used in this part [42 USCS §§ 3796 et seq.]--

(1) "catastrophic injury" means consequences of an injury that permanently prevent an individual from performing any gainful work;

(2) "child" means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is--

(i) 18 years of age or under;

(ii) over 18 years of age and a student as defined in section 8101 of title 5, United States Code; or

(iii) over 18 years of age and incapable of self-support because of physical or mental disability;

(3) "firefighter" includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department and an officially recognized or designated public employee member of a rescue squad or ambulance crew;

(4) "intoxication" means a disturbance of mental or physical faculties resulting from the introduction of alcohol into the body as evidenced by--

(i) a post-mortem blood alcohol level of .20 per centum or greater; or

(ii) a post-mortem blood alcohol level of at least .10 per centum but less than .20 per centum unless the Bureau receives convincing evidence that the public safety officer was not acting in an intoxicated manner immediately prior to his death;

or resulting from drugs or other substances in the body;

(5) "law enforcement officer" means an individual involved in crime and juvenile delinquency control or reduction, or enforcement of the laws, including, but not limited to, police, corrections, probation, parole, and judicial officers;

(6) "public agency" means the United States, any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States, or any unit of local government, department, agency, or instrumentality of any of the foregoing; and

(7) "public safety officer" means--

(A) an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, or as a member of a rescue squad or ambulance crew;

(B) an employee of the Federal Emergency Management Agency who is performing official duties of the Agency in an area, if those official duties--

(i) are related to a major disaster or emergency that has been, or is later, declared to exist with respect to the area under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.); and

(ii) are determined by the Director of the Federal Emergency Management Agency to be hazardous duties; or

(C) an employee of a State, local, or tribal emergency management or civil defense agency who is performing official duties in cooperation with the Federal Emergency Management Agency in an area, if those official duties--

(i) are related to a major disaster or emergency that has been, or is later, declared to exist with respect to the area under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.); and

(ii) are determined by the head of the agency to be hazardous duties.

28 CFR 32.2

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*** THIS SECTION IS CURRENT THROUGH THE OCTOBER 8, 2001 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 32 -- PUBLIC SAFETY OFFICERS' DEATH AND DISABILITY BENEFITS
SUBPART A -- DEATH AND DISABILITY BENEFITS

28 CFR 32.2

§ 32.2 Definitions.

(e) Personal injury or injury means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases.

(g) Traumatic injury means a wound or a condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain.

(i) Occupational disease means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation.

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

(2)

No. 01-674

In the Supreme Court of the United States

PAMELA H. YANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether the Bureau of Justice Assistance properly determined that the mental effects upon a police officer of a false accusation against him did not constitute a "personal injury" within the meaning of the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)	5
Christensen v. *Harris County*, 529 U.S. 576 (2000)	5
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994)	6
Durco v. *United States*, 14 Cl. Ct. 424 (1988)	4
Harold v. *United States*, 634 F.2d 547 (Ct. Cl. 1980)	9, 10
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994)	5, 6
United States v. *Haggar Apparel Co.*, 526 U.S. 380 (1999)	6
United States v. *Locke*, 471 U.S. 84 (1985)	8
United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001)	5, 6
Wisniewski v. *United States*, 353 U.S. 901 (1957)	9
Wydra v. *Law Enforcement Assistance Admin.*, 722 F.2d 834 (D.C. Cir. 1983)	4

Statutes and regulations:

Federal Employers' Liability Act, 45 U.S.C. 51	6

Statutes and regulations—Continued: Page

Justice Assistance Act of 1984, Pub. L. No. 98-473, Tit. II, § 609F, 98 Stat. 2099 10
Public Safety Officers' Benefit Act of 1976, 42 U.S.C. 3796 *et seq.*:
42 U.S.C. 3796(a) 2, 5, 6, 7, 8-9
42 U.S.C. 3796(b) 7
42 U.S.C. 3796a(1) 2-3, 4, 7, 8
42 U.S.C. 3796a(2) 6
42 U.S.C. 3796a(3) 10
42 U.S.C. 3796b 6
42 U.S.C. 3796b(4) 6
Tucker Act, 28 U.S.C. 1491 (1994 & Supp. V 1999) 4
28 C.F.R.:
Section 32.2 6
Section 32.2(e) 2
Section 32.2(g) 2, 4
Section 32.24 ..... 3, 5
Section 32.24(h)(1) 4

Miscellaneous:

122 Cong. Rec. 22,643-22,645 (1976) 9
H.R. Conf. Rep. No. 1501, 94th Cong., 2d Sess. (1976) 9
H.R. Rep. No. 1031, 94th Cong., 2d Sess. (1976) 2
H.R. Rep. No. 1032, 94th Cong., 2d Sess. (1976) 2, 7, 9, 10
S. Rep. No. 816, 94th Cong., 2d Sess. (1976) 7, 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 258 F.3d 1356. The opinion of the United States Court of Federal Claims (Pet. App. 17a-49a) is reported at 45 Fed. Cl. 782. The decision of the Bureau of Justice Assistance is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2001. The petition for a writ of certiorari was filed on October 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Public Safety Officers' Benefits Act of 1976 (the Act or PSOBA) provides for payment of a death

benefit to enumerated survivors of police officers and firefighters in cases in which the Bureau of Justice Assistance (the Bureau or BJA), a component within the Department of Justice, "determines, under regulations issued pursuant to [the Act], that [the public safety officer] has died as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a). Bureau regulations promulgated under the Act define a "personal injury" as "any traumatic injury." 28 C.F.R. 32.2(e). Traumatic injury, in turn, is defined by rule as

> a wound or a condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain.

28 C.F.R. 32.2(g).

In promulgating these regulations, the BJA's predecessor, the Law Enforcement Assistance Administration, relied upon identical passages in two House reports defining "personal injury" as including:

> all injuries to the body which are inflicted by an outside force, whether or not it is accompanied by physical impact, as well as diseases which are caused by or result from such injuries, but not diseases which arise merely out of the performance of duty. * * * *

H.R. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976); H.R. Rep. No. 1032, 94th Cong., 2d Sess. 5 (1976).

The Act contains additional limitations upon entitlement. Among these are a provision that "[n]o benefit shall be paid * * * if the death * * * was caused by

the intentional misconduct of the public safety officer or by such officer's intention to bring about his death." 42 U.S.C. 3796a(1).

2. Petitioner's decedent, William Yanco, was a police officer in Wellesley, Massachusetts, until he died in 1992. Officer Yanco's duties included counseling children and their families. Pet. App. 5a.

In May 1992, the mother of a boy whom Officer Yanco had been counseling accused Officer Yanco of inappropriate sexual behavior with the boy. Pet. App. 5a. Three investigations conducted in June 1992 by local officials cleared Officer Yanco of any misconduct. At the time of his death in late June, Officer Yanco was aware of the results of at least two of those investigations. *Id.* at 6a.

Officer Yanco exhibited symptoms of acute psychological distress during June 1992, presumably as the result of the accusation, the publicity that it received, or both. His wife urged him to seek treatment, but he declined. Pet. App. 6a.

On June 22, 1992, Officer Yanco left work early, telephoned the police station from his home, and, while on the telephone with a supervisor, fatally shot himself. Pet. App. 6a, 22a. Letters he had written to his wife and children that day were later found on his office computer. *Id.* at 6a. Aspects of those letters suggested that he had been considering suicide. *Id.* at 22a.

3. In June 1993, petitioner submitted to the Bureau a claim for a death benefit under the PSOBA. The claim was denied in October 1993. At petitioner's request, in November 1995, a hearing on the denial was conducted, pursuant to 28 C.F.R. 32.24. Pet. 6; Pet. App. 7a. At the hearing, petitioner presented, among other evidence, reports and testimony by a psychiatrist and a psychologist. Pet. App. 24a-25a. These witnesses

concluded that, at the time of his death, Officer Yanco was experiencing post-traumatic stress disorder and depression caused by his police duties. *Id.* at 14a, 23a, 33a.

On December 6, 1995, the hearing officer issued a determination that petitioner was entitled to payment. Pet. 6. The hearing officer concluded that Officer Yanco's mental conditions constituted "personal injuries" under the Act, and that his mental state rendered his suicide unintentional. Pet. App. 7a.

Acting under 28 C.F.R. 32.24(h)(1), the Bureau's Director reversed the hearing officer and denied petitioner's claim in February 1997. The Director found that Officer Yanco's mental conditions did not meet the definition of "traumatic injury" in 28 C.F.R. 32.2(g). The Director further determined that Officer Yanco's suicide did not occur in the line of duty, and that, because the suicide was "carefully thought out and methodically carried through" and therefore intentional, 42 U.S.C. 3796a(1) bars payment of the benefit. Pet. App. 7a, 28a-30a.

4. Petitioner filed a complaint in the Court of Federal Claims challenging the denial.[1] Petitioner argued that the false accusation against Officer Yanco caused a "traumatic injury" within the meaning of the regulation and that this mental injury proximately caused his death. Pet. App. 35a.

The trial court granted summary judgment for the United States. Pet. App. 43a. The court of appeals

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[1] The Court of Federal Claims possesses jurisdiction to hear such challenges under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. V 1999). *Wydra* v. *Law Enforcement Assistance Admin.*, 722 F.2d 834 (D.C. Cir. 1983); see also *Durco* v. *United States*, 14 Cl. Ct. 424, 426 (1988).

affirmed. *Id.* at 1a-16a. Both courts concluded in relevant part that the Bureau's definition of "personal injury" as excluding non-physical injuries is a permissible construction of the Act, and that substantial evidence supports the Bureau's finding that Officer Yanco committed suicide as the result of mental strain. *Id.* at 10a-14a, 33a-39a, 40a-43a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is thus unwarranted.

1. The court of appeals correctly held that the regulations excluding non-physical injuries from the coverage of the Act are valid and entitled to deference under *Chevron U.S.A Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984). See Pet. App. 11a; see also *id.* at 9a (quoting and applying *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001)). Petitioner argues (Pet. 12) that the Bureau's decision is facially ineligible for *Chevron* deference. This is incorrect. The regulations implementing the PSOBA were issued by express authorization of Congress in 42 U.S.C. 3796(a). The Director's decision, in turn, constitutes formal adjudication after a hearing. See 28 C.F.R. 32.24. *Chevron* deference therefore attaches both to the rules and to the Director's statutory and regulatory interpretations. *Mead Corp.*, 121 S. Ct. at 2172-2173; *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (noting that interpretation in agency opinion letter was not "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" and thus "d[id] not warrant *Chevron*-style deference"); see also *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Indeed, the Director's construction of the

BJA rules defining "personal injury" "must be given controlling weight unless * * * plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted).

2. Petitioner also contends (Pet. 13-14) that the BJA's interpretation of the definition of "personal injury" in 28 C.F.R. 32.2 is contrary to the Act. That argument also lacks merit. Because Congress expressly delegated authority to the Bureau to decide whether an officer has died as the proximate result of a "personal injury" sustained in the line of duty, 42 U.S.C. 3796(a), but did not define "personal injury," see 42 U.S.C. 3796b (definitions), the Bureau must do so. Cf. *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) (deferring to regulatory elaboration of term in import statute). Petitioner's argument (Pet. 14) that 42 U.S.C. 3796b(4) suggests that Congress intended "personal injury" to include "mental injury" is wholly unfounded. Section 3796b(4) merely defines "intoxication" for purposes of Section 3796a(2), which provides that benefits are not to be paid if the officer died while "voluntarily intoxicated."

Petitioner argues (Pet. 14-16) that *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), compels the conclusion that "personal injury" in the PSOBA includes mental injury. This, too, is mistaken. *Consolidated Rail* did not involve an agency interpretation of a statute or any other issue of deference. Instead, it involved a straightforward issue of statutory interpretation in the context of the Federal Employers' Liability Act (FELA). FELA provides a general remedial scheme for recovery in the event of "injury," 45 U.S.C. 51. The PSOBA, in contrast, provides for the recovery of benefits only in the event of "personal injury"

resulting in death or "catastrophic injury" resulting in "permanent and total disability," 42 U.S.C. 3796(a) and (b). Accordingly, there is no reason to think the scope of the term "injury" in FELA would be the same as the scope of "personal injury" in the PSOBA.

Moreover, the text of the Act supports the view that by "personal injury" Congress meant only bodily injury: It is unlikely that Congress contemplated that a mental injury could "direct[ly] and proximate[ly]" cause death as required by the Act. 42 U.S.C. 3796(a). Indeed, the Act specifically provides that no recovery shall be had when death was caused by the deceased "officer's intention to bring about his death." 42 U.S.C. 3796a(1). Consistent with this language, the committee reports emphasize the physical risks posed to public safety officers, but do not mention mental dangers. H.R. Rep. No. 1032, *supra*, at 2-4; S. Rep. No. 816, 94th Cong., 2d Sess. 3 (1976). The text and purposes of the PSOBA are thus quite unlike those of the statute at issue in *Consolidated Rail*.

3. Petitioner asserts (Pet. 16) that the Bureau's construction of "personal injury" may cause the PSOBA to be implemented differently than certain "remedial statutes." Petitioner cites no cases presenting even a potential conflict with the decision below. Moreover, the PSOBA is a special federal statute providing benefits to local law enforcement officers who may be eligible for local death benefits as well. It provides benefits only when officers have been catastrophically injured "in the line of duty" or killed "as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a) and (b). It is not a general workers' compensation or death benefit statute. It is a unique statute, and there is no reason to interpret it in parallel to dissimilar statutes.

4. Petitioner contends (Pet. 17) that the court of appeals wrongly relied on the fact that a number of state workers' compensation statutes currently exclude purely mental injuries from the category of "injury" to conclude that the plain meaning of the term "personal injury" does not necessarily include mental strain. Petitioner further contends (Pet. 18) that, in so holding, the court below misquoted a 1974 Massachusetts Supreme Judicial Court decision. Petitioner's discussion of state law is simply irrelevant. Even assuming that state insurance authorities unanimously considered mental injuries to be "personal injuries" when the PSOBA was passed in 1976 (which petitioner neither asserts nor demonstrates), the meaning ascribed to the term by state statutes and common law would not control here, in light of the valid administrative interpretation of the statute. See, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 98 (1985). Moreover, the application of the personal injury definition to deny benefits here is buttressed by the Act's express exclusion of benefits when the death was caused by the "officer's intention to bring about his death." 42 U.S.C. 3796a(1). As previously demonstrated, the text and legislative history of the Act provide ample support for the definition of "personal injury" adopted by the Bureau.

5. Finally, petitioner argues (Pet. 19) that the court of appeals erred by citing language in the House and Senate committee reports relevant to the term "personal injury," rather than relying upon the Conference Report. The Conference Report contains no pertinent discussion, however. Furthermore, the definition of "personal injury" set forth in the House reports quoted by the court of appeals (Pet. App. 12a) is relevant. Although the House and Senate conferees substantially adopted the Senate's version of what became 42 U.S.C.

3796(a), see H.R. Conf. Rep. No. 1501, 94th Cong., 2d Sess. 5-7 (1976), the Senate had previously amended its bill on the floor to make it more like the House bill. The Senate floor amendment inserted the word "personal" before "injury" in conformity with the House bill (while deleting from the Senate bill language that would have limited coverage to deaths caused by criminal acts). 122 Cong. Rec. 22,643-22,645 (1976); compare 42 U.S.C. 3796(a) with S. Rep. No. 816, *supra*, at 9. In the floor debate regarding the amendment and the range of injuries to be covered, there was no suggestion that mental injuries were to be included. 122 Cong. Rec. at 22,643-22,645. Therefore, it was appropriate for the Bureau and the court of appeals to seek guidance from the House reports regarding the intended meaning of "personal injury." In any event, in light of the valid administrative interpretation of the statute entitled to *Chevron* deference, any disputes about the relative weights of the conference, House, and Senate reports do not affect the result here. The court below correctly held the interpretation at issue to be entitled to *Chevron* deference.

To the extent that petitioner may suggest that the decision below is in tension with *Harold* v. *United States*, 634 F.2d 547 (Ct. Cl. 1980), petitioner is in essence asserting an intra-circuit conflict that, if it existed, would not justify invoking this Court's jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In fact, in stating that the House Report suggests that the PSOBA may be "'in the nature of'" a workers' compensation act, 634 F.2d at 552 (quoting H.R. Rep. No. 1032, *supra*, at 5-6), the Court of Claims in *Harold* was merely offering an additional or alternative basis

for interpreting the term "line of duty" not to preclude payment of benefits where death was caused by the deceased officer's on-duty gross negligence.[2] That brief passage in the *Harold* decision simply has no bearing on the term "personal injury."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The statute has since been amended, Pub. L. No. 98-473, Tit. II, § 609F, 98 Stat. 2099, and now expressly precludes payment "if the public safety officer was performing his duties in a grossly negligent manner at the time of his death." 42 U.S.C. 3796a(3).

APPENDIX

1. Section 3224 of Title 28, Code of Federal Regulations provides:

§ 32.24. Request for a hearing.

(a) A claimant may, within thirty (30) days after notification of ineligibility by the Bureau, request the Bureau to reconsider its finding of ineligibility. The Bureau shall provide the claimant the opportunity for an oral hearing which shall be held within 60 days after the request for reconsideration. The claimant may waive the oral hearing and present written evidence to the Bureau within 60 days after the request. The request for hearing shall be made to the Director, Public Safety Officers' Benefits Program, BJA, Washington, DC 20531.

(b) If requested, the oral hearing shall be conducted before a hearing officer authorized by the Bureau to conduct the hearing in any location agreeable to the claimant and the hearing officer.

(c) In conducting the hearing, the hearing officer shall not be bound by common law or statutory rules of evidence, by technical or formal rules of procedure, or by Chapter 5 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), but must conduct the hearing in such manner as to best ascertain the rights of the claimant. For this purpose, the hearing officer shall receive such relevant evidence as may be introduced by the claimant and shall, in addition, receive such other evidence as the hearing officer may determine to be necessary or useful in evaluating the claim. Evidence may be presented orally or in the form of written statements and exhibits. The hearing shall be recorded,

and the original of the complete transcript shall be made a part of the claims record.

(d) Pursuant to sections 805, 806 and 1205(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. 3786, 3787 and 3796c, the hearing officer may, whenever necessary:

(1) Issue subpoenas;

(2) Administer oaths;

(3) Examine witnesses; and

(4) Receive evidence at any place in the United States.

(e) If the hearing officer believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing officer may adjourn the hearing and, at any time prior to mailing the decision, reopen the hearing for the receipt of such evidence.

(f) A claimant may withdraw his or her request for a hearing at any time prior to the mailing of the decision by written notice to the hearing officer so stating, or by orally so stating at the hearing. A claimant shall be deemed to have abandoned his or her request for a hearing if he or she fails to appear at the time and place set for the hearing, and does not, within 10 days after the time set for the hearing, show good cause for such failure to appear.

(g) The hearing officer shall, within 30 days after receipt of the last piece of evidence relevant to the proceeding, make a determination of eligibility. The determination shall set forth the findings of fact and conclusions of law supporting the determination. The hearing officer's determination shall be the final agency

decision, except when it is reviewed by the Director under paragraphs (h) or (i) of this section.

(h)(1) The Director may, on his or her own motion, review a determination made by a hearing officer. If the BJA Director decides to review the determination, he or she shall:

(i) Inform the claimant of the hearing officer's determination and the BJA Director's decision to review that determination; and

(ii) Give the claimant 30 days to comment on the record and offer new evidence or argument on the issues in controversy.

(2) The BJA Director, in accordance with the facts found on review, may affirm or reverse the hearing officer's determination. The BJA Director's determination shall set forth the findings of fact and conclusions of law supporting the determination. The BJA Director's determination shall be the final agency decision.

(i)(1) A claimant determined ineligible by a hearing officer under paragraph (g) of this section may, within 30 days after notification of the hearing officer's determination:

(i) Request the BJA Director to review the record and the hearing officer's determination; and

(ii) Comment on the record and offer new evidence or argument on the issues in controversy.

(2) The BJA Director shall make the final agency determination of eligibility within 30 days after expiration of the comment period. The notice of final determination shall set forth the findings of fact and conclusions of law supporting the determination. The BJA

Director's determination shall be the final agency decision.

(j) No payment of any portion of a death or permanent and total disability benefit, except interim death benefits payable under § 32.16, shall be made until all hearings and reviews which may affect that payment have been completed.

2. Section 3796a of Title 42, United States Code provides:

§ 3796a. Limitations on benefits

No benefit shall be paid under this subchapter—

(1) if the death or catastrophic injury was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death or catastrophic injury;

(2) if the public safety officer was voluntarily intoxicated at the time of his death or catastrophic injury;

(3) if the public safety officer was performing his duties in a grossly negligent manner at the time of his death or catastrophic injury;

(4) to any individual who would otherwise be entitled to a benefit under this subchapter if such individual's actions were a substantial contributing factor to the death or catastrophic injury of the public safety officer; or

(5) to any individual employed in a capacity other than a civilian capacity.